Supreme Court, U.S.
FILED
06-970 JAN 12 2007
OFFICE OF THE CLERK

No. 06M58

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Appellant,

and

SENATOR JOHN MCCAIN, REPRESENTATIVE TAMMY BALDWIN, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN,
Intervenor-Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the three-judge district court erred in holding that Section 203 of the Bipartisan Campaign Reform Act (BCRA), 2 U.S.C. § 441b, is unconstitutional as applied to the three advertisements that appellee Wisconsin Right to Life, Inc. sought to broadcast in 2004.

PARTIES TO THE PROCEEDINGS

The appellants who are parties to this jurisdictional statement are four Members of Congress who intervened as defendants in the district court in support of the constitutionality of BCRA's "electioneering communications" provision as applied to the advertisements at issue in this case: Senator John McCain of Arizona; Representative Tammy Baldwin of Wisconsin; Representative Christopher Shays of Connecticut; and Representative Martin Meehan of Massachusetts. For ease of reference, these appellants will hereafter be referred to as the "Intervenor-Appellants." The Federal Election Commission was the originally named defendant in the district court.

The appellee, which was plaintiff in the district court, is Wisconsin Right to Life, Inc., a non-profit Wisconsin corporation.

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WISCONSIN RIGHT TO LIFE, INC.
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OPINION BELOW

The opinion of the district court, *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006) (*WRTL*) is reprinted in the appendix to this jurisdictional statement. App. 1a-39a.

JURISDICTION

The three-judge district court entered an opinion and order on December 21, 2006. On December 28, 2006, the court issued an order finding that there was no just reason for delay and thus entering final judgment with respect to the issues decided in its opinion of December 21, 2006. App. 40a. Intervenor-Appellants filed a notice of appeal on December 29, 2006. App. 43a. The jurisdiction of this Court rests on Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 113-114, codified at 2 U.S.C. § 437h note, and 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at pages 64a-79a of the appendix to this jurisdictional statement.

STATEMENT

This case concerns Section 203 of the Bipartisan Campaign Reform Act of 2002, which prohibits corporations from using their general treasury funds to pay for "electioneering communications" that refer to a candidate for federal office and are broadcast within 30 days of a federal primary election or 60 days of a federal general election. Pub. L. No. 107-155, § 203, 116 Stat. 91-92, codified at 2 U.S.C. § 441b(b)(2). This Court sustained BCRA Section 203 against a facial constitutional challenge in *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003). Following that decision, Wisconsin Right to Life, Inc. (WRTL) filed suit in federal district court, alleging that BCRA's restrictions on the financing of "electioneering communications" were unconstitutional as applied to certain broadcast advertisements referencing a federal candidate that WRTL sought to finance with its corporate general treasury funds.

The three-judge district court denied WRTL's request for preliminary injunctive relief and subsequently dismissed the complaint. App. 47a-48a; 49a-57a. WRTL appealed to this Court, which vacated the dismissal and remanded to the district court for consideration of the merits in the first instance. App. 44a-46a. On remand, in spite of a largely undisputed record demonstrating that the advertisements at issue were functionally identical to those that this Court considered in upholding Section 203 in *McConnell* and that alternative means were available to WRTL to disseminate its message, the three-judge district court denied the motions for summary judgment of the FEC and Intervenor-Defendants and granted WRTL's motion for summary judgment as applied to the three advertisements it sought to run in 2004. App. 24a. In so concluding, the district court created and applied a constitutional test that, like the failed

"magic words" test rejected by Congress and by *McConnell*, focused solely on the face of the advertisements. App. 18a. Intervenor-Appellants appeal the district court's judgment.

1. For the last century, federal law has regulated the use of corporate general treasury funds in connection with federal elections. In 1907, in response to a national concern over the corrosive effect of corporate contributions in elections, Congress passed the Tillman Act, which prohibited "any corporation . . . [from] mak[ing] a money contribution in connection with any election to any political office." Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-865; *see United States* v. *Automobile Workers*, 352 U.S. 567, 571-572, 575 (1957) (quoting 34 Stat. 864). In 1925, Congress strengthened the Act, extending the prohibition on corporate contributions to cover "anything of value" and making the giving or receiving of corporate contributions a federal crime in the Federal Corrupt Practices Act. *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (citing Federal Corrupt Practices Act of 1925, §§ 301, 313, 43 Stat. 1070, 1074).

The Smith-Connally Act of 1943 temporarily applied the Corrupt Practices Act to labor unions. *Automobile Workers*, 352 U.S. at 578 (citing 57 Stat. 163, 167). Despite this enactment, "Congress was advised of enormous financial outlays said to have been made by some unions in connection with the national elections of 1944." *Automobile Workers*, 352 U.S. at 579. By 1947, Congress had clearly extended the prohibition to include corporate and union expenditures designed to influence federal elections. *Id.* at 583-584 (discussing passage of the Taft-Hartley Act to, as Senator Taft explained, "plug a loophole which obviously developed, and which, . . . as a matter of fact, would absolutely have destroyed the prohibition against political advertising by corporations" (quoting 93 Cong. Rec. 6439)).

In 1972, "Congress continued its steady improvement of national election laws by enacting [the Federal Election Campaign Act (FECA)]." *McConnell*, 540 U.S. at 117. In doing so, Congress "ratified the earlier prohibition on the use of corporate and union general treasury funds for political contributions and expenditures, but expressly permitted

corporations and unions to establish and administer separate segregated funds (commonly known as political action committees or PACs) for election-related contributions and expenditures." *Id.* at 118.

Despite these longstanding Congressional efforts to prevent corporate and union corruption of federal elections, during the 1990s corporations began to use their general treasury funds to finance so-called "issue" advertisements that, despite their label, were in purpose and effect election advertisements. This period of corporate circumvention followed this Court's decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, where this Court interpreted the former version of 2 U.S.C. § 441b to apply only to expenditures that "expressly advocate" a candidate's election or defeat in order to avoid constitutional vagueness problems. 479 U.S. 238, 249 (1986). A decade earlier, in *Buckley* v. *Valeo*, this Court had introduced the concept of express advocacy when it narrowly construed other FECA provisions to avoid problems of vagueness and overbreadth. 424 U.S. 1, 43-44, 77-80 (1976). The Court had provided examples of words that it considered express advocacy, including "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52. Those examples "eventually gave rise to what [became] known as the 'magic words' requirement." *McConnell*, 540 U.S. at 191.

Corporations and unions learned quickly that the "magic words" test allowed them to spend money from their corporate coffers to influence federal elections by avoiding words of express advocacy. As this Court later observed in *McConnell*, after just more than a decade of experience under the system, "the unmistakable lesson" was that the express advocacy "requirement is functionally meaningless" because the "absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *McConnell*, 540 U.S. at 193.

In order to close the much-exploited loophole in the longstanding prohibition on the use of corporate and union funds to influence federal elections, Congress adopted Section 203 of BCRA, which amended Section 441b of FECA by barring corporations and unions from financing "electioneer-

ing communications" with money from their general treasuries and requiring them to finance all such communications with funds from separate PAC accounts. 2 U.S.C. § 441b(b)(2). Congress defined the term "electioneering communication" as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is, with the exception of communications referring to a candidate for President or Vice President, "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88, codified at 2 U.S.C. § 434(f)(3)(A)(i)(III).[1] Corporations and unions remained free to establish separate segregated funds and to pay for "electioneering communications" from those funds. 2 U.S.C. § 441b(b)(2)(C). Congress created this tailored definition to close the "magic words" loophole while avoiding vagueness concerns that arose in *Buckley* and *Massachusetts Citizens for Life*.

2. In *McConnell*, this Court upheld Section 203 against a facial constitutional challenge. As the Court held, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view [BCRA Section 203] as a 'complete ban' on expression rather than a regulation." *McConnell*, 540 U.S. at 204 (quoting *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003) and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990)). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *Id.* (quoting *Beaumont*, 539 U.S. at 163). Pointing out that its well-established campaign-finance jurisprudence reflects "respect for the legislative

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[1] A communication is deemed "targeted to relevant electorate" if it "can be received by 50,000 or more persons" in the district (in the case of House races) or State (in the case of Senate races) the candidate seeks to represent. 2 U.S.C. § 434(f)(3)(c).

judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.* at 205 (citations and internal quotation marks omitted), the Court concluded that the compelling governmental interests that support requiring corporations to finance express advocacy from a PAC apply equally to their financing of "electioneering communications." *Id.* at 206. The Court explained that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *Id.*

In addressing the argument that the definition of "electioneering communications" might encompass some genuine issue advocacy, the Court considered it sufficient that "the vast majority of ads" run during the 30- and 60-day intervals between federal primary and general elections "clearly had such a purpose." 540 U.S. at 206. The Court found it decisive, moreover, that "in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.*

3. Appellee WRTL is a non-profit, non-stock Wisconsin corporation. Because WRTL accepts contributions from corporations and does not qualify for any exemption from Section 441b, *see* Am. Compl. ¶ 23, WRTL may not use its corporate treasury to finance expenditures on behalf of or in opposition to candidates for federal office. WRTL maintains a political action committee, the Wisconsin Right to Life Political Action Committee (WRTL-PAC). WRTL and its PAC have a long history of supporting or opposing candidates in federal elections.

This case involves three broadcast advertisements that WRTL proposed to run shortly before the 2004 federal election in Wisconsin with funds from its corporate treasury. In 2004, WRTL and its PAC targeted Senator Russell Feingold for defeat. WRTL-PAC announced in the title to a March 2004 press release its "Top Election Priorities: Re-elect President Bush ... Send Feingold Packing." Intervening

Defs.' Mem. in Opp. to Pl.'s Mot. for Summary Judgment, Ex. 2. Warning that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections," WRTL-PAC's Chair emphasized that "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." *Id.* Three weeks later, WRTL itself issued a similar release subtitled, "Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush . . . Send Feingold Packing!" *Id.*, Ex. 3.[2] The release quoted the legislative director of WRTL as saying:

> One of the most important elections in the history of the right to life movement will take place in November[.] The people who represent us in Washington should, at the very least, have some modicum of respect for human life. Apparently, Feingold, Kohl and Kerry do not. This issue only increases our resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing.

Id.

The Senate filibuster against certain judicial nominees nominated by President Bush—the subject of the WRTL advertisements at issue—was an important campaign issue in the 2004 Wisconsin Senate race. A news report in The Milwaukee Journal Sentinel in November 2003 headlined "3 seeking Feingold seat attack him on judges issue: Republicans see Senate fight as important to voters," noted:

> In Wisconsin, the three Republicans vying to take on Senate Democrat Russ Feingold are attacking him on judges and assert the controversy resonates with voters. . . . "I think it will be a huge issue," said GOP Senate candidate Russ Darrow.

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[2] This press release is available on the WRTL website at http://www.wrtl.org/News04/032604.pdf.

Intervening Defs.' Mem. in Opp. to Pl.'s Mot. for Summary Judgment, Ex. 5.

Moreover, WRTL, through its PAC, explicitly connected its campaign opposition to Senator Feingold to the filibuster issue. The March 2004 press release, for example, noted that WRTL's three endorsed candidates for Feingold's Senate seat "all stated they would oppose a filibuster." Intervening Defs.' Mem. in Opp. to Pl.'s Mot. for Summary Judgment, Ex. 2. WRTL continued to advocate Senator Feingold's defeat during the summer of 2004, and in a July 14, 2004 news release, criticized Senator Feingold for his position on the filibuster of judicial nominees. FEC's Opp. to Pl.'s Mot. for Prelim. Inj., Ex. 16.

On July 26, 2004, as the September primary election neared, WRTL began using its corporate treasury funds to finance preparation of the three advertisements at issue here. The lead-in to each advertisement varied, but each criticized a "group of Senators" for filibustering judicial nominees and then requested that the viewer "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." App. 58a-63a. Because WRTL intended to broadcast advertisements on television or radio that referred to a clearly identified candidate for federal office and targeted the electorate of that candidate, WRTL's advertisements would constitute "electioneering communications" if run during the statutorily prescribed period. 2 U.S.C. § 434(f)(3)(A)(i); BCRA § 201. Accordingly, federal law required WRTL to use only its PAC funds to finance these advertisements beginning on August 15, 2004—thirty days before the primary election. 2 U.S.C. § 441b(b)(2); BCRA § 203.

4. WRTL filed suit on July 28, 2004, alleging that the statute could not constitutionally be applied to its advertisements and seeking injunctive relief to prohibit the FEC from enforcing the statute as to those ads. WRTL anticipated that its "ongoing advertisements [would be considered] electioneering communications from August 15, 2004 to November 2, 2004, because they meet the statutory and regulatory definitions." Compl. ¶ 23.

WRTL also sought declaratory and injunctive relief as to any advertisement that constituted "grassroots lobbying," a term WRTL did not define. Compl. 13. WRTL subsequently amended its complaint to add one paragraph. Paragraph 16 of the Amended Complaint alleged that "there is a strong likelihood" that WRTL intends, at some unspecified future date, to run "grass-roots lobbying ads" that "similarly require referencing a clearly identified candidate for federal office in broadcast communications to the citizens of Wisconsin." Am. Compl. ¶ 16. WRTL did not identify any particular time, place, issue or candidate that it intended to mention in such advertisements, merely indicating that WRTL is "concerned about a range of issues." *Id.*

The district court denied WRTL's request for a preliminary injunction as to the 2004 advertisements. App. 56a. In holding that WRTL had not established a substantial likelihood of success on the merits, the district court, relying on a footnote in *McConnell*, explained that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge [appellant] propounds before us." App. 52a (citing *McConnell*, 540 U.S. at 190 n.73)). The district court further reasoned that the specific facts of the case "suggest that [WRTL's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Id.* The district court explained:

> In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will often convey [a] message of support or opposition" regarding candidates. Here, WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did [appellant] switch to broadcast media. This followed the PAC endorsing opponents seeking to unseat a candidate whom [appellant] names in its broadcast adver-

> tisements, and the PAC announcing as a priority "sending Feingold packing."

App. 53a-54a (citations omitted).

The three-judge court also found preliminary injunctive relief unwarranted because "the actual limitation on plaintiff's freedom of expression ... is not nearly so great as plaintiff argues." App. 54a. The court held that "BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spending through political action committees (PACs)." *Id.* The court found it important that WRTL also could have communicated its message during the period preceding the election using print media (such as newspaper advertisements or billboards), electronic media (such as email and internet), or telephone calls. App. 54a n.32.

The district court subsequently dismissed WRTL's complaint in an unpublished memorandum and order. App. 47a-48a. The court held, "for the reasons set forth in" the opinion denying WRTL's motion for preliminary relief, that WRTL's as-applied challenge was "foreclosed by [this] Court's decision in *McConnell*." App. 48a.

WRTL appealed to this Court, which vacated the dismissal, ruling that the district court had misread its footnote in *McConnell* and that "[i]n upholding § 203 [of BCRA] against a facial challenge, we did not purport to resolve future as-applied challenges." App. 45a. As to the district court's statement that the "facts of this case suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating," this Court concluded that it was "not clear" whether the three-judge court "intended to rest on this ground" in dismissing WRTL's complaint. *Id.* (internal quotation marks omitted). This Court remanded for the district court "to consider the merits of WRTL's as-applied challenge in the first instance." App. 46a.

5. Following the remand, the lower court set a briefing schedule for summary judgment motions and ordered expe-

dited discovery into "the purpose and effect of plaintiff's 2004 advertisements for the 2004 campaign (but not into any historical or planned future advocacy by plaintiff), and the burdens BCRA places upon plaintiff's expression, including the limits of PAC fundraising, the effectiveness of using other media, and the option of employing alternative text for the intended advertisements." Scheduling Order of Apr. 17, 2006, at 2.

The FEC and Intervenor-Appellants offered expert testimony that supported the common-sense view that advertisements such as WRTL's would have an electoral effect in the context of the Wisconsin senatorial race. Charles H. Franklin, Professor of Political Science at University of Wisconsin, Madison, opined that, "within the political context of an election campaign, any advertising that addresses topics of current debate is very likely to have electioneering effects, regardless of the purported purpose of the ad." Franklin Expert Report 23. Those effects were enhanced in the context of the 2004 election because WRTL previously had issued public statements criticizing Senator Feingold's position on the filibuster issue and calling for his electoral defeat. *Id.* at 34-35. Douglas Bailey, an experienced political advertising consultant, likewise opined that WRTL's 2004 ads "would undoubtedly influence the election" and added that the judicial filibuster issue played an important role in the Senate campaign in Wisconsin during the summer of 2004. Intervening Defs.' Mem. In Opp. to Pl.'s Mot. for Summary Judgment, Ex. 15.[3]

WRTL relied on an assertion by its executive director that in her opinion—which she admitted was not based on empirical research—the advertisements would not have af-

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[3] The importance of the judicial filibuster issue in the 2004 election was also supported by other sources. For example, the Republican Party of Wisconsin emphasized the issue in criticizing Senator Feingold, asking in its online poll "[w]hat is the #1 reason why Russ Feingold should be voted out of office in 2004" and offering "[h]is obstruction of President Bush's judicial nominees" as one of four possible answers. Intervening Defs.' Mem. in Opp. to Pl.'s Mot. for Summary Judgment, Ex. 16.

fected the campaign because "[t]hey did not speak about elections." Lyons Dep. 33:5-33:11. She conceded, however, that defeating Senator Feingold would have been "consistent with WRTL's ... goals." *Id.* at 31:24-32:1. As to whether WRTL lacked effective alternative means to communicate its message, WRTL offered only the vague assertion that WRTL-PAC had found fundraising too difficult to obtain sufficient funds for the advertisements, despite the fact that only four years earlier WRTL-PAC had raised more than $150,000. Intervening Defs.' Mem. In Opp. to Pl.'s Mot. for Summary Judgment, Ex. 22. WRTL failed to demonstrate that it could not have employed any other alternative method for conveying its message that would not have implicated BCRA, such as avoiding a specific reference to Senator Feingold.[4]

6. On December 21, 2006, the district court granted WRTL's motion for summary judgment as applied to the three advertisements it sought to run in 2004. In reviewing the justiciability of WRTL's claim relating to the 2004 ads, the court concluded that WRTL's claim was not moot because it fell within the "capable of repetition, yet evading review" exception to that doctrine. App. 12a. The court reasoned that the text of the ads, combined with WRTL's stated intention to run unspecified advertisements during future periods, was sufficient to create a "reasonable expectation" that WRTL will be "subject to the same action again." App. 11a-12a & n.15. To the extent that its conclusion conflicted with another three-judge court's recent review of "essentially the same issue," the court "respectfully disagree[d]." App. 12a n.14 (citing *Christian Civic League of*

[4] Indeed, the advertisements did not include contact information for Senator Feingold, but rather referred the audience to a website (www.befair.org) that contained information criticizing him for his position on the filibuster.

Maine, Inc. v. *FEC*, No. 06cv0614, 2006 WL 2792683 (D.D.C. Sept. 27, 2006) (*CCL*)).[5]

Addressing the merits of WRTL's challenge as to the 2004 advertisements, the three-judge district court found it both "practically and theoretically unacceptable" to consider anything other than the text and images of the advertisements. App. 16a. The court devised a five-factor analysis of the "four corners" of WRTL's 2004 advertisements. Specifically, the lower court "limit[ed] its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate." App. 18a. Based on its application of that test, the court concluded that the advertisements were not the "functional equivalent of express advocacy" because they did not on their face meet any of the five characteristics except the first. App. 20a. Reasoning that this Court held in *McConnell* that the justifications for regulating express advocacy extend only to its "functional equivalent," the Court held that there existed no compelling interest to justify applying BCRA Section 203 to WRTL's 2004 advertisements. App. 21a. The Court did not address WRTL's ability to use alternative means, including the use of WRTL-PAC, to disseminate its message.

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[5] *CCL* involved a challenge to Section 203 of BCRA as applied to one specific advertisement and, as here, as to future "grassroots lobbying" advertisements. The court rejected both claims as non-justiciable, but on facts very different from those present here. 2006 WL 2792683. For example, with regard to whether the dispute was "capable of repetition, yet evading review," CCL had not, unlike WRTL, sought to run additional ads after the commencement of its lawsuit. *See* App. 12a n.15. The district court's ruling in *CCL* was recently appealed to this Court.

The district court also considered WRTL's claim as to "materially similar grass-roots lobbying ads falling within the electioneering communications prohibition periods" that WRTL intended to run in the future. With respect to that claim, the lower court concluded that "such an intention is too speculative and thus not sufficiently concrete to state a cognizable claim under Article III." App. 13a. Accordingly, the court "reject[ed] WRTL's generalized lobbying claim as unripe" noting that it agreed with the conclusion of another three-judge panel that "recently reached the same conclusion in a similar case." *Id.* (citing *CCL*, 2006 WL 2792683, at *2-5). WRTL has not appealed to this Court the three-judge court's order insofar as it rejected WRTL's claim relating to unspecified future "grassroots lobbying" advertisements.

Judge Roberts dissented, stating that the majority's "plain facial analysis of the text in WRTL's 2004 advertisements—ignoring the context in which the text was developed"—was "inconsistent with *McConnell*, . . . inconsistent with this panel's own prior rulings, and finds little support in logic." App. 25a. Examining the context of the advertisements at issue, Judge Roberts found that "WRTL's role in the political environment that wrought the ad campaign in the first place could be probative of the intent of the ads" and cited a long list of facts suggesting an electoral purpose. App. 34a; *see also* App. 34a-36a.[6]

THE QUESTION PRESENTED IS SUBSTANTIAL

Congress enacted BCRA "to correct the flaws it found" in a broken system of campaign finance laws. *McConnell*, 540 U.S. at 194. Prior to the passage of that landmark legislation, corporations, unions, and other groups freely circumvented FECA's source limitations and disclosure requirements by running millions of dollars' worth of candidate-

[6] Judge Roberts concluded, however, that there was "[a] genuine issue of material fact . . . as to whether WRTL's advertisements were intended to influence a Senate election, or to spark litigation, or to be genuine issue ads." App. 39a. Accordingly, he would not have resolved the case on summary judgment.

specific "issue ads." Although the "vast majority" of such advertisements had a clear electioneering purpose, *id.* at 206, these advertisements were deemed to fall outside FECA so long as they omitted "magic words" such as "vote for" or "vote against." Section 203 of BCRA was enacted to close this loophole, and this Court, in upholding that provision against a facial challenge in *McConnell*, concluded that a number of compelling interests justified the effect of the Act on First Amendment rights, including preserving the integrity of the electoral process, preventing corruption, sustaining active, alert citizens, and preserving confidence in government. *Id.* at 205 & n.88. The Court also stressed that BCRA left open various alternative means for corporations to express their views. *Id.* at 206.

The three-judge court in this case acknowledged *McConnell*'s holding that the justifications for regulating express advocacy apply equally to the regulation of "issue" advertisements, the majority of which are "'intended to influence the voters' decision and have that effect.'" App. 21a (quoting *McConnell*, 540 U.S. at 206); *cf.* App. 30a-31a (Roberts, J., dissenting).[7] But when the majority of the court concluded that it should consider only the text of WRTL's advertisements, it turned back the clock to the era when "magic words" prevailed. Startlingly, the majority of the three-judge court concluded that it was compelled, as a matter of law, to ignore the largely undisputed evidentiary record before it and invent a constitutional test that focuses solely on the face of the ads—a variant of the failed "magic

[7] The court also properly said it was limiting the scope of this as-applied challenge to the three specific advertisements WRTL sought to run in 2004, and that it was declining on ripeness grounds WRTL's invitation to create a broad grass-roots lobbying exception—rulings that WRTL has not appealed. Despite the majority's modest statement of the scope of its ruling, however, its holding effectively creates a massive loophole in the "electioneering communications" provisions for issue advertisements that do not, on their face, contain language expressly promoting, attacking, supporting, or opposing candidates.

words" test rejected by Congress and by this Court in *McConnell*.[8]

Because the district court's decision is seriously flawed and contrary to *McConnell*, and because it threatens to undermine Section 203 of BCRA by reopening the door to widespread circumvention of the longstanding prohibition on the use of corporate and union general treasury funds to influence federal elections, Intervenor-Appellants respectfully request that this Court note probable jurisdiction and set this appeal for briefing and argument.

a. In *McConnell*, this Court considered and upheld Congress's regulation of precisely the type of advertisements that are at issue here. The Court was presented with a massive record,[9] which included not only the text of advertisements purported to be genuine issue advertisements (many of which were facially indistinguishable from the advertisements WRTL sought to run in this case), but also evidence as to the timing, purpose, and effect of such advertisements. 540 U.S. at 127-128, 193, 206. Based on that extensive record, this Court observed that the distinction between so-called "issue" advertisements and express advocacy, while "neat in theory," was "functionally meaningless." *Id.* at 126, 193. "Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And al-

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[8] Indeed, even considering solely the text of the advertisements, they are best understood as attacking Senator Feingold. The advertisements assert that "[a] group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or no' vote." App. 58a-63a. They then say that this is "politics at work," that it is "causing gridlock," and they urge viewers to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.* Given that the advertisements attack the actions of a "group of Senators" and then immediately mention two senators, the clear inference is that Senator Feingold and Kohl are among that "group." That fact is further reason to conclude that the district court's test is both unworkable and at odds with the practical experience that informed Congress's judgment in enacting Section 203 of BCRA.

[9] *See McConnell* v. *FEC*, 251 F. Supp. 2d 176, 813 (D.D.C. 2003) (Leon, J.) (describing the record as "elephantine").

though the resulting advertisements did not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id.* at 193. It was with that understanding that this Court concluded Congress has a compelling interest in regulating "issue" advertisements that, even if they do not expressly advocate the election or defeat of a candidate, serve as the functional equivalent of express advocacy. *Id.* at 206.

The analysis by the majority of the three-judge court in this case turns the *McConnell* reasoning on its head. The majority would introduce a standard that would, like the failed magic words test, require an advertisement's purpose to be divined solely from its text and without regard to the relevant context. It would permit just the type of evasion that Congress intended to foreclose and would allow corporations to circumvent the law by eschewing forbidden "magic words" while still conveying a clear campaign message in light of the prevailing context. It was precisely because such an approach was unworkable—and because the "vast majority" of facially benign "issue ads" were "intended to influence the voters and have that effect"—that this Court upheld the facial validity of Section 203.[10]

The majority's approach is particularly troublesome given the necessarily fact-intensive nature of an as-applied challenge. As Judge Roberts indicates in his dissent, given the very nature of "issue ads," this Court was compelled to look beyond the text of the advertisements in *McConnell*, even in the context of a *facial* challenge. App. 34a. Yet the majority of the three-judge district court refused to take the

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[10] In rejecting WRTL's claim regarding "materially similar grass-roots lobbying ads" as unripe, the majority purported to decline WRTL's invitation "to carve out" a broad "grass-roots lobbying" exception. App. 12a-13a. But that is precisely the effect of the court's ruling. By limiting its review of WRTL's 2002 advertisements to their text, the majority would introduce the equivalent of the "magic words" test that applied prior to *McConnell*, which would enable any for-profit (and non-profit) corporation and labor union to run ads like WRTL's 2004 advertisements and render Congress's amendments to Section 441b meaningless.

same approach in the context of an *as-applied* challenge, which by its very nature "requires an analysis of the facts of a particular case." *Field Day, LLC* v. *County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006). In so doing, the court turned a blind eye to the most obvious and relevant uncontroverted facts.

The facts presented to the three-judge court demonstrated convincingly that WRTL's advertisements were no different than those considered in *McConnell* and, in fact, represented precisely the type of advertisement that Congress had in mind when it enacted BCRA. The majority declined to consider, for example: WRTL's historic and then-current opposition to Senator Feingold and its announcement that one of its "top priorities" in 2004" was to defeat his bid for reelection; WRTL's linkage, through its PAC, of its opposition to Senator Feingold to the filibuster issue; WRTL's timing of its broadcast advertisements to coincide with the Senate's 2004 summer recess (after four judicial filibuster votes had already occurred but just prior to the primary and general elections); WRTL's decision to mention Senator Feingold by name at a time when the judicial filibuster issue had become a central focus in the Wisconsin Senate race and was being used to attack Senator Feingold; and the ample availability of alternative means for WRTL to disseminate its message.[11]

b. The five-factor, text-based test that the majority developed to review WRTL's advertisements only serves to illustrate further that its approach is contrary to both *McConnell* and common sense. The majority concluded that WRTL's advertisements were not intended to influence voters' decisions because, on their face, the advertisements: (1) although describing an issue of "legislative scrutiny" in the

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[11] The court suggested that such facts were relevant at an earlier stage. App. 52a (denying WRTL's motion for a preliminary injunction in part because "[t]he facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating").

Senate (judicial filibusters); (2) did not expressly refer to Senator Feingold's prior voting record or current position on judicial filibusters; (3) mentioned Senator Feingold only in the closing "call-to-action" line, along with Senator Kohl; (4) did not (expressly) promote, attack, support, or oppose either Senator or comment on their past statements or records; and (5) did not mention an election, a candidacy, a political party, or comment on a candidate's character or fitness for office. App. 18a.

As the Supreme Court recognized in *McConnell*, Congress's compelling interest in regulating use of corporate and union general treasury funds to influence federal elections extends to those advertisements that are the "functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206. Functional equivalence, of course, requires analysis of how advertisements actually *function* in the real world, an inquiry that the court below declined to undertake. Congress's interest in regulating the flow of corporate and union dollars to efforts to influence federal elections is no less compelling in cases where the nature of the advertisement is correctly understood in light of the overall context in which the ad ran than in cases in which reference to the text of the ad alone is sufficient. The advertisements at issue in this case, even if read as not attacking Senator Feingold on their face, when understood in context, are precisely the types of advertisements that Congress addressed in Section 203 of BCRA and that this Court considered in *McConnell*.

By holding BCRA Section 203 unconstitutional as applied to the advertisements at issue here, the three-judge district court's ruling stands as an obstacle to the full achievement of the purposes of a critically important federal law. The ruling threatens to create a large class of advertisements that are exempt from the law even though they fall within its terms, and it does so based on reasoning that is, at best, in significant tension with a recent and fully considered decision of this Court. This Court has long recognized that lower court decisions that strike down the application of federal statutes to broad swaths of conduct within their scope merit plenary review, particularly when, as here,

their reasoning is questionable. *See, e.g., United States* v. *Edge Broad. Co.*, 509 U.S. 418, 425 (1993). This case is no exception to that principle.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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JANUARY 2007

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

and

SEN. JOHN MCCAIN, *ET AL.*

Intervenor-Defendants.

Civ. No. 04-1260 (DBS, RWR, RJL)
Three-Judge Court
[STAMP: FILED DEC 21 2006]

Before: SENTELLE, Circuit Judge; ROBERTS, District Judge; and LEON, District Judge.

Opinion for the Court filed by District Judge Leon, in which Circuit Judge Sentelle joins in full. Dissenting opinion filed by District Judge Roberts.

Leon, District Judge:

Plaintiff, Wisconsin Right to Life, Inc. ("WRTL" or "the Corporation"), brings this action against defendant, the Federal Election Commission ("FEC"), seeking a judgment declaring section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81,[1] unconstitutional as it applies to three broadcast advertisements WRTL intended to run within thirty days of Wisconsin's 2004 federal primary and sixty days of the 2004 federal

[1] Codified at 2 U.S.C. § 441b(a), (b)(2).

general election, as well as "materially similar ads" it "intends to run" in the future. (Am. Compl. ¶¶ 1, 13, 15, 16.)

Under BCRA's prohibition on "electioneering communications," WRTL could not lawfully run the three advertisements during the 30- and 60-day periods before the 2004 primary and general elections. Thus, WRTL claims that the enforcement of BCRA with regard to these advertisements would violate the First Amendment, which provides: "Congress shall make no ~~law . . . abridg~~ging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. Amend. I.

Now before the Court are cross-motions for summary judgment filed on behalf of (1) WRTL, (2) the FEC, and (3) intervening defendants, United States Senator John McCain and Representatives Tammy Baldwin, Martin Meehan, and Christopher Shays (collectively, "Interveners"). Upon due consideration of the parties' submissions, the relevant case law, and the entire record herein, WRTL's Motion for Summary Judgment is GRANTED as to the three ads WRTL intended to run in 2004, and the FEC and Interveners' Motions are DENIED.

BACKGROUND

WRTL is a nonprofit, nonstock, Wisconsin, ideological advocacy corporation recognized by the Internal Revenue Service as tax-exempt under § 501(c)(4) of the Internal Revenue Code.[2] (Mem. & Op., Findings of Fact ¶ 1, Sept. 14, 2006.) On July 26, 2004, WRTL began broadcasting a radio

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[2] WRTL admits that it does not quality for any exception permitting it to pay for the exception electioneering communications from corporate funds because (a) it is not a "qualified nonprofit corporation" within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication prohibition and (b) its advertisements are "targeted" so that it does not fit the exception for § 501(c)(4) organizations as described in 2 U.S.C. § 441b(c)(2). (Am. Compl. ¶ 23 (citing 2 U.S.C. § 441b(c)(6)(A)).)

advertisement entitled "Wedding"[3] (Compl. Ex. A), which "encourage[d] Wisconsin listeners to contact their U.S. Senators (Sen. Russell Feingold and Sen. Herb Kohl) . . . to ask them to vote against [the then-]anticipated filibusters of President Bush's federal judicial nominees" (Am. Compl. ¶ 6). At the same time, the Corporation initiated the production of a second radio ad entitled "Loan"[4] (Compl. Ex. B) and

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[3] The radio script for "Wedding," attached as Exhibit A to plaintiff's Complaint, reads as follows:

PASTOR: And who gives this woman to be married to this man?

BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .

VOICE-OVER: Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

[4] The radio script for "Loan," attached as Exhibit B plaintiff's Complaint, reads as follows:

LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well . . .

COUPLE: Yes, yes . . . we're listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca . . .

VOICE-OVER: Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple

one television ad entitled "Waiting"[5] (*id.* Ex. C). (Am. Compl. ¶ 12.) Like Wedding, Loan and Waiting encourage their listeners to contact Senators Feingold and Kohl and

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"yes" or "no" vote. So qualified candidates aren't getting a chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

[5] The television script for "Waiting," attached as Exhibit C to plaintiffs Complaint, reads as follows:

VOICE-OVER: There are a lot of judicial nominees out there who can't go to work. Their careers are put on hold because a group of Senators is filibustering—blocking qualified nominees from a simple "yes" or "no" vote.

It's politics at work and it's causing gridlock.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

WRTL REPRESENTATIVE VOICE-OVER: Wisconsin Right to Life is responsible for the content of this advertising.

The script describes the visual aspect of the advertisement is described as follows:

We see vignettes of a middle-aged man being as productive as possible while his professional life is in limbo:

He reads the morning paper

He polishes his shoes

He checks for mail, which hasn't arrived

He scans through his Rolodex

He reads his Palm Pilot manual

He pays bills.

At the end of the ad, the website "www.BeFair.org" is displayed, and a four-second disclaimer reads: "Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertisement, not authorized by any candidate or candidate's committee."

urge them to oppose the filibustering of federal judicial nominees. None of the three advertisements, however, reference either Senator's past votes on the filibuster issue and none contain any language that could be fairly construed as promoting, attacking, supporting, or opposing ("PASO") either Senator. Yet because WRTL intended to use its general treasury funds to continue to run its ads through "the adjournment of Congress"[6] (*id.* ¶ 13), the ads would be prohibited as "electioneering communications" by BCRA section 203[7] between the dates of August 15 and November 2, 2004[8] (*id.* ¶ 14). Accordingly, on July 28, 2004, WRTL filed a

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[6] Elsewhere in WRTL's Complaint, the Corporation alleges that intended to run its ads "throughout August [2004]." (Am. Compl. 12.)

[7] BCRA section 203 prohibits corporations from financing "electioneering communications" through their general treasuries. *See* 2 U.S.C. § 441b(a), (b)(2). BCRA section 201, in turn, defines "electioneering communications" as:

> any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before the primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (cc) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3(A).

According to the Act, "a communication which refers to a clearly identified candidate for Federal office is 'targeted to the relevant electorate' if the communication can be received by 50,000 or more persons—(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or (ii) in the State the candidate seeks to represent, in the case of a candidate for Senator." 2 U.S.C. § 434(i)(3)(C).

[8] In 2004, the Wisconsin primary was held on September 14, and the general election was held on November 2. (Am. Compl. ¶ 12.) Consequently, WRTL's advertisements would be considered "electioneering communications" from August 15 to September 14 (30 days before the

complaint in this Court against the FEC,[9] challenging the constitutionality of section 203 as it applies to the Corporation's anti-filibuster ads and seeking "declaratory and injunctive relief permitting [the Corporation] to run [its ads] and materially similar ads in the future."[10] (Am. Compl. ¶15.) That same day, WRTL filed a Motion for Preliminary Injunction, requesting that the Court "preliminarily enjoin the FEC from enforcing the prohibition on corporate expenditures for electioneering communications at Section 203 of the [BCRA], as applied to (a) electioneering communications by WRTL that constitute grass-roots lobbying and (b) the electioneering communications by WRTL contained in [the Wedding, Loan, and Waiting advertisements] until a final hearing on the merits." (Pl.'s Mot. Prelim. Inj. at 2.) On July 29, 2004, WRTL's application for a three-judge district court was granted pursuant to 28 U.S.C. § 2284 and section 403 of the BCRA (Order, July 29, 2004); this Court was empaneled four days later (Order, Aug. 9, 2004).

On August 12, 2004, this Court held oral argument on plaintiff's Motion for Preliminary Injunction, which it denied via Minute Order later that day. In denying, WRTL's Motion, we relied on the Supreme Court's opinion in *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003). Recognizing that the *McConnell* Court was only considering a facial challenge to BCRA, this Court nevertheless concluded that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge WRTL propounds be-

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primary) and from September 3 to November 2 (60 days before the general election). (*Id.* at 14.)

[9] The FEC is the government agency charged with enforcing the relevant provisions of the Federal Election Campaign Act, as amended by the BCRA. (Mem. & Op., Findings of Fact ¶ 2, Sept. 14, 2006).

[10] WRTL did not and does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds to finance the challenged advertisements. (Am. Compl. ¶¶ 34-37.)

fore us."[11] (Mem. & Op. at 4, Aug. 17, 2004.) On May 10, 2005, following supplemental briefing by the parties, we dismissed plaintiff's Complaint in its entirety. Again, this Court concluded that "WRTL's 'as-applied' challenge to BCRA is foreclosed by the Supreme Court's decision in *McConnell*." (Mem. & Op. at 2, May 10, 2005.) Within two days of this Court's Order, plaintiff filed a Notice of Appeal to the United States Supreme Court pursuant to 28 U.S.C. § 1253 and BCRA section 403(a)(3). (Notice of Appeal, May 12, 2005). The Supreme Court noted probable jurisdiction on September 27, 2005. *WRTL* v. *FEC*, 126 S. Ct. 36 (2005).

On January 23, 2006, the Supreme Court vacated this Court's May 10, 2005 dismissal, explaining that "[i]n upholding § 203 [of BCRA] against a facial challenge, we did not purport to resolve future as-applied challenges." *WRTL* v. *FEC*, 126 S. Ct. 1016, 1018 (2006). The case was thus remanded to this Court with instructions to "consider the merits of WRTL's as-applied challenge in the first instance." *Id.*

On March 23, 2006, this Court granted a Motion to Intervene as Defendants bought by United States Senator John McCain and Representatives Tammy Baldwin, Christopher Shays, and Martin Meehan pursuant to BCRA section 403(b). We then issued a Scheduling Order on April 17, 2006, which allowed for an expedited period of discovery.[12]

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[11] The Court pointed specifically to the Supreme Court's discussion of the BCRA's "backup" definition of "electioneering communications," 2 U.S.C. § 434(f)(3)(A)(ii), which would take effect only if the primary definition—cited above—were held to be "constitutionally insufficient." The Supreme Court declined review of the backup definition, stating: "[W]e uphold *all application* of the primary definition and accordingly have no occasion to discuss the backup definition." *McConnell*, 540 U.S. at 190 n.73 (emphasis added).

On August 13, 2006, plaintiff filed a Motion for Injunction Pending Appeal. This Court's denial of that Motion was upheld by the Supreme Court on September 14, 2004. *WRTL* v. *FEC*, 542 U.S. 1305 (2004) (Rehnquist, Circuit Justice).

[12] Our colleague, in his dissenting opinion, suggests that our earlier unanimous decision to allow discovery in this case is somehow inconsistent

From June 23 to September 11, 2006, the parties submitted their respective Motions for Summary Judgement, response briefs, and proposed findings of fact.[13] On September 18, 2006, the Court held oral argument on the parties' Motions.

STANDARD OF REVIEW

All parties move for summary judgment pursuant to Federal Rule of Civil Procedure 56, which states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp* v. *Catrett*, 477 U.S. 317, 322-24 (1986). In deciding whether there is a disputed issue of material fact, the Court must draw all justifiable inferences in favor of the non-moving party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Where the court finds that facts material to the outcome of the case are at issue, a case may not be disposed of by summary judgment. *Id.* at 248. If the facts in dispute are "merely colorable, or . . . not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). Though the moving party bears the burden of establishing that there are no genuine issues of material fact and that judgment on

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with our decision today to limit our constitutional evaluation of the ads to their four corners, as opposed to the context in which they would have been aired. We disagree. At the time our discovery decision was made, we had not yet focused on, let alone decided, the ultimate substantive issues we would have to resolve in order to decide this case. Simply stated, permitting discovery by the parties was necessary to ensure that both this Court and the Supreme Court would have the option of relying upon the facts developed, if doing so would be necessary to reaching the ultimate constitutional issues in this case.

[13] Briefing was originally scheduled to be completed by September 1, 2006; however in the course of discovery, the FEC filed a Motion to Compel that was not ruled on until August 18, 2006. The Court permitted the parties to supplement their Summary Judgment briefing in response to the discovery permitted by the Court in response to the FEC's Motion.

the legal issues is appropriate in its favor, *Celotex*, 477 U.S. at 322-24, a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial," Fed. R. Civ. P. 56(e). If there is insufficient evidence indicating that the fact-finder could return a favorable verdict for the nonmoving party, then summary judgment is proper. *Anderson*, 477 U.S. at 252.

JURISDICTION

Jurisdiction for constitutional challenges to BCRA was squarely vested in this Court by Congress. Defendants, however, as an initial matter, oppose WRTL's constitutional challenge to the 2004 anti-filibuster ads as moot and WRTL's challenge to certain hypothetical "materially similar" ads that it wishes to run in the future as not ripe. For the following reasons, we disagree with defendants' mootness argument, but agree with their ripeness position.

I. MOOTNESS

WRTL chose to forgo running its ads in 2004 rather than take the risk that enforcement proceedings would be brought against it. (Am. Compl. ¶ 52; Pl.'s Proposed Findings of Fact ¶ 42.) As a result, defendants' mootness argument boils down to its contention that Article III's "case or controversy" requirement is not satisfied because "[e]vents have so transpired that the decision [of this Court] will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." (Def.'s Mem. Addressing Apr. 17, 2006 Scheduling Order, at 3 (internal quotation marks omitted) (quoting *Pharmachemie B.V.* v. *Barr Labs., Inc.*, 276 F.3d 627, 631 (D.C. Cir. 2002)).) We disagree.

Plaintiff's factual predicament is not novel. Indeed, it is a classic example of the well-established exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." Plaintiff's citation to no less than ten federal court decisions involving election-related challenges

in which this exception was applied well establishes this point. (*See* Pl.'s Mem. Compliance Apr. 17, 2006 Scheduling Order, at 4-5 n.3 (citing *Norman* v. *Reed*, 502 U.S. 279, 287-88 (1992); *Meyer* v. *Grant*, 486 U.S. 414, 417 n.2 (1988); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 774 (1978); *Cal. Pro-Life Council* v *Getman* 328 F.3d 1088, 1095 n.4 (9th Cir. 2003); *Majors* v. *Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Fla. Right to Life, Inc.* v. *Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001); *Va. Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 390 n.3 (4th Cir. 2001); *Stewart* v. *Taylor*, 104 F.3d 965, 969-71 (7th Cir. 1997); *N.H. Right to Life Political Action Committee* v. *Gardner*, 99 F.3d 8, 18 (1st Cir. 1996); *Kansans for Life, Inc.* v. *Gaede*, 38 F. Supp. 2d 928, 932 (D. Kan. 1999).)

Defendants grudgingly characterize the application of this exception as a "close question" notwithstanding our Circuit Court's holding in *Branch* v. *FCC*, 824 F.2d 37, 41 n.2 (D.C. Cir. 1987), that "[c]ontroversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters 'capable of repetition, yet evading review.'" (Intervening Def.s' Resp. Scheduling Order at 4). The thesis underlying their objection is that plaintiff cannot satisfy the two-prong test established by the Supreme Court to determine whether this exception should apply. How so?

In *First National Bank of Boston* v. *Bellotti* the Supreme Court, citing its decision in *Weinstein* v. *Bradford*, held that a court can exercise jurisdiction over a plaintiff's claims if: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." 435 U.S. at 774 (internal quotation marks omitted; alterations in original) (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). Plaintiff easily satisfies both prongs of this test.

As to the first prong, it is entirely unreasonable, if not fanciful, to expect that plaintiff could have obtained com-

plete judicial review of its claims in time for it to air its ads during the 30 and 60-day periods leading up to federal primary and general elections ("BCRA blackout period") in 2004: WRTL filed its Complaint and Motion for Preliminary Injunction in this Court on July 28, 2004. The Supreme Court issued its remand order on January 23, 2006. It is now December 2006, and despite the fact that both courts have—pursuant to BCRA section 403(a)(4)—expedited the disposition of this matter "to the greatest possible extent," plaintiff's claims have yet to be "fully litigated." Defendants' argument that "the two-year election cycle should ordinarily provide sufficient time for final resolution of the type of as-applied challenge at issue here" (Intervening Def.s' Resp. Scheduling Order, at 4-5) is wholly unrealistic. It assumes—without support—that a plaintiff can know the pieces of legislation that will be pending before Congress *two years* in advance of Congress actually considering the legislation. This Court finds no evidence in the record to suggest that WRTL knew, in the summer/fall of 2002, that judicial filibustering would be an issue before the United States Senate during the BCRA blackout period in 2004. Indeed, there is no evidence in the record to suggest that the *Senate* knew, in the summer/fall of 2002, that judicial filibustering would be an issue during the BCRA blackout period in 2004. In fact, it was not until December 10, 2003—the date that the Supreme Court issued its opinion in *McConnell*—that *anyone* knew if there would even be a BCRA blackout period in 2004. Thus, WRTL easily satisfies the first prong of the *Weinstein* test.

As to the second prong, the Court finds that there is a highly "reasonable expectation" that plaintiff "will be subject to the same action again." Defendants' contrary argument that the present controversy is *incapable* of repetition is premised on its contention—that we reject—that the context surrounding the creation and dissemination of the ads (including plaintiff's intent, the availability and adequacy of non-broadcast media, the perceptions of the target audience, and the circumstances of the 2004 campaign) should be relied upon in assessing this decision. (*See id.* at 5.) To the contrary, because we believe that our review should be limited

to the text and images of the ads themselves—as will be explained more fully later—we are not concerned with the supposed "perfect storm" of contextual characteristics alleged by defendants.[14] While WRTL's intention to run genuine issue advertisements during future BCRA blackout periods is not enough to sustain its generalized claim regarding "grassroots lobbying advertisements," it is enough to create a "reasonable expectation" that it "will be subject to the same action again"[15] In light of the fact that legislation typically arises in the 30- and 60-day periods before a federal primary or general election, *see McConnell* v. *FEC*, 251 F. Supp. 2d 176, 793 (D.D.C. 2003) (Leon, J.), this Court finds that WRTL's remaining claim is "capable of repetition, yet evading review."

II. RIPENESS

WRTL's as-applied challenge features a prophylactic challenge to what it anticipates to be the prohibition by the FEC of its broadcasting "materially similar" ads in future election contests. WRTL appears to add this prayer for relief as part of its larger objective: to get this Court—and ultimately the Supreme Court—to carve out an exception to BCRA's electioneering communications definition for what it refers to as "grass-roots lobbying" advertisements. (Am. Compl. ¶ 6.) Indeed, WRTL admits that "this Court is not

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[14] To the extent the District Court in *Christian Civil League of Maine, Inc. ("CCLM")* v. *FEC*, No. 06cv0614, 2006 WL 2792683 (D.D.C. Sept. 27, 2006)—confronted with essentially the same issue—held that "the League's claims are . . . moot and not saved by the 'capable of repetition, yet evading review' exception to the doctrine insofar as they do pertain to the circumstances surrounding the League's efforts to broadcast the Crossroads advertisement," *CCLM*, 2006 WL 2792683, at *1, we respectfully disagree.

[15] In fact, WRTL attempted to run a different ad during the BCRA blackout period in 2006. While the ad was not the textual equivalent of the ads in this case—and while this Court does not speak to merits of WRTL's claim as to that ad—the attempt nevertheless lends credence to WRTL's contention that there is a "reasonable expectation" that it "will be subject to the same action again."

required by the [Supreme Court's] remand to go beyond WRTL's specific ads," but nevertheless asks the Court to fashion a "more general rule to guide the regulated public." (Pl.'s Mem. Compliance Apr. 17, 2006 Scheduling Order at 7.) Defendants, not surprisingly, contend that this Court should not consider WRTL's generalized grassroots lobbying claim as it is "beyond the scope of the Supreme Court's remand, ... not ripe, and ... too speculative and hypothetical to be justiciable under Article III." (Def.'s Mem. Addressing Apr. 17, 2006 Scheduling Order, at 8.) We agree.

WRTL alleges, at most, that it "intends to run materially similar grass-roots lobbying ads falling within the electioneering communication prohibition periods before future primary and general elections in Wisconsin." (Am. Compl. ¶ 16.) Simply stated, such an intention is too speculative and thus not sufficiently concrete to state a cognizable claim under Article III. Like another three-judge panel of this District Court that recently reached the same conclusion in a similar case, *see CCLM*, 2006 WL 2792683, at *2-5, we also cannot expand our authority beyond the contours of Article III. Accordingly, we reject WRTL's generalized lobbying claim as unripe and turn to plaintiff's arguments challenging the constitutionality of BCRA as it applies to the three anti-filibuster ads.

ANALYSIS

Reduced to its essence, plaintiff's as-applied challenge boils down to two arguments: (1) that its 2004 ads are neither express advocacy nor its functional equivalent; and (2) that the Government has failed to demonstrate a compelling interest in regulating these ads. For the following reasons, we agree with each of plaintiff s contentions.

III. Express Advocacy and Its Functional Equivalent Versus Genuine Issue Advertising

In *McConnell*, 540 U.S. 93, the Supreme Court evaluated a facial challenge to the constitutionality of BCRA's electioneering communications provision. In doing so, its majority concluded that there was a compelling government

interest in regulating express advocacy and its functional equivalent (i.e., "sham issue ads") during the BCRA blackout period. Based on our interpretation of that ruling, this three-judge Court in 2004 dismissed this as-applied challenge to the constitutionality of the FEC's prohibition of the ads designed to be aired on television in Wisconsin during the BCRA blackout period leading up to the 2004 primary and general election. On appeal, however, the Supreme Court, in evaluating our decision, stated that *McConnell* had *not* foreclosed as-applied challenges to the constitutionality of the electioneering communications definition and, accordingly, remanded the case back to us for consideration of the merits of WRTL's claims. In doing so, the Supreme Court, in essence, acknowledged the possibility that certain ads (i.e., "genuine issue ads"), that are neither express advocacy nor its functional equivalent, could be unconstitutionally captured by BCRA's electioneering communications definition. Plaintiff, not surprisingly, contends that these ads fall into that category.

To determine whether plaintiff is correct, this Court must engage in a two-step analysis of the ads in question. First, it must evaluate whether any or all of the ads constitute either express advocacy or its functional equivalent. If they do, of course, that would be the end of the challenge because the Supreme Court in *McConnell* upheld BCRA's authority to regulate them. If they are not, however, this Court must then move on to determine whether the Government has demonstrated the necessary compelling state interest to regulate genuine issue ads during the 30- and 60-day periods leading up to the federal primary and general elections.

Defendants contend that all three ads are sham issue ads and are therefore regulable under the Supreme Court's majority holding in *McConnell*. The keystone to the defendants' analysis is their contention that the determination of whether an ad is a sham issue ad should not be limited to a facial evaluation of the ad's language and images, but a contextual analysis of the "intent" behind the ad's creation and

the "effect" that the ad is intended, and likely, to have on the voting public. Plaintiff disagrees strongly. It contends that the judicial assessment of the ads should be limited to a facial evaluation of the ads' language and images. Determining intent and the likely effect of an ad on the viewing public is, to plaintiff's way of thinking, too conjectural and wholly impractical if future as-applied challenges are going to be evaluated on an emergency basis by three-judge panels prior to and during the BCRA blackout period leading up to federal primary and general elections. We agree.

The three ads in this case all deal with the public policy issue of filibustering the President's judicial candidates in the Senate. On their face, they set forth WRTL's position against this practice and conclude with the all-too-familiar "call-to-action line" exhorting viewers/listeners, who presumably agree with WRTL's position, to contact Wisconsin's two United States Senators, Kohl and Feingold, and inform them of their opposition. The ads do not comment on either Senator's past or current position regarding this practice. Indeed, to the untutored viewer's eye, the ads, on their face, neither reveal either Senator's thinking on the issue, nor reference Senator Feingold's upcoming election contest. Therefore, plaintiff contends that these ads are a textbook example of genuine issue ads that are neither express advocacy nor its functional equivalent.

Defendants nonetheless contend that it is legally insufficient to limit an analysis of the ads to the face of the ads themselves and their objectively discernable components. They fear that doing so would ultimately result in the airing of too many issue ads that were *actually* "intended" to affect an election. Of course, to discern whether the sponsoring organization of these issue ads had the primary, or even ancillary, subjective intention to affect the election of the named candidate, the FEC would, by necessity, have to depose, at a minimum, the "decision maker(s)" of the organization in advance of the advertisements' airing. Moreover, to determine whether a particular ad that was intended to affect the election actually was likely to do so, would addition-

ally require the retention of expert witnesses, on both sides, to speculate as to such. Common sense, if nothing else, dictates that requiring such prerequisites to assessing whether a given ad is a "sham ad" and therefore regulable under BCRA's electioneering communications definition is both practically and theoretically unacceptable.

It is practically unacceptable because as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign when litigating contextual framework issues and expert testimony analysis is simply not workable. More importantly, however, is the fact that it is theoretically unacceptable because it proceeds on the highly questionable assumptions that: (1) any subjective intent to affect the election, regardless of its degree of importance, should negate an otherwise genuine issue ad; and (2) the speculative conjecture of experts can *actually* project the "likely" impact of a given ad on the electoral process. Neither the Supreme Court, nor any other Court, has recognized the validity of either assumption, and we do not find sufficient evidence here to bless either.[15] To

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[16] While, as our colleague's dissent recognizes, the Supreme Court's *McConnell* opinion may have alluded to the purpose and effect for which ads were run in analyzing whether section 203's definition of "electioneering communication" was facially constitutional, the Court's reasoning was not based upon an analysis of the subjective intent of either the parties airing the advertisements or the listeners hearing them. Rather, it was based largely upon an assessment of the generic past practices of certain media experts in designing sham issue ads that would affect elections, but not include the so-called "magic words" prohibited by *Buckley*. *See McConnell*, 540 U.S. at 193. Even those experts had to concede, however, that there are such things as genuine issue ads that the definition in section 203 would capture some of the time. *See, e.g.*, *McConnell*, 251 F. Supp. 2d at 794-95 (Leon, J.). The as-applied challenge here, by contrast, puts squarely before a court for the first time the issue of whether three particular ads are genuine issue ads, thereby forcing this Court to decide whether to limit its assessment of the purpose and effect of those ads to the information contained within the ads' four corners. Thus, since the *McConnell* Court was spared such a choice in dealing with the facial challenge it confronted, its references to purpose and effect are of limited significance in this matter today.

the contrary, as recognized by the Supreme Court, delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake. Indeed, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Supreme Court itself recognized that a test distinguishing between a discussion of issues and a discussion of candidates should not be based on a listener's determination of the speaker's subjective intent. The *Buckley* Court cited its prior decision in *Thomas* v. *Collins*, 323 U.S. 516, 535 (1945), with approval:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43.[17]

The uncertainty originally identified in *Thomas* is magnified, of course, in the context of election-related speech

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[17] It is this language that led the Supreme Court to develop a "saving construction"—later termed the "magic-words test"—for old FECA § 608(e)(1), which provided that "[n]o person may make any expenditure . . . *relative* to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." Noting that FECA contained no definition clarifying what expenditures are "relative to" a candidate, the Supreme Court found that it was unconstitutionally vague. *Buckley*, 424 U.S. at 41-42.

where any reference to a candidate, who is an office holder, can be interpreted—or misinterpreted—as campaign-motivated, as opposed to public policy-motivated. Thus, a system such as that encouraged by defendants where federal judges would be charged with conjuring the subjective intent of the speaker to affect the election would fly in the face of decades of First Amendment jurisprudence and undoubtedly chill those exercising their free speech rights. Simply stated, it appears to this Court that the judiciary, in conducting First Amendment analysis, should not be in the business of trying to read any speaker's mind. Such an inquiry is unprecedented and not properly a part of any First Amendment analysis.

Accordingly, in evaluating whether WRTL's 2004 anti-filibuster ads are express advocacy or its functional equivalent, this Court will limit its consideration to language within the four corners of the anti-filibuster ads that, at a minimum: (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate. In addition, as to the televised ad, the Court will also look to the images displayed in concert with the language to evaluate whether they otherwise accomplish the prohibited result.[18]

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[18] Our colleague notes in his dissent a particular website reference that is included in the credits at the end of all three of the advertisements at issue. According to defendants, the website itself contained language that either opposed or attacked Senator Feingold and is therefore cited as proof that WRTL's intention in running the radio and television advertisements was to negatively influence Senator Feingold's electoral chances. Considering that BCRA regulates neither references to, nor the content of, advocacy-based websites, this Court believes that, unless and until Congress decides to amend BCRA to include such a regulation,

In this case, the language in WRTL's advertisements does not mention an election, a candidacy, or a political party, nor do they comment on a candidate's character, actions, or fitness for office. Nevertheless, they do describe an issue that had been, and was likely to be, an ongoing issue of legislative concern in the Senate. Further, while the advertisements state that "[a] group of Senators" is filibustering federal judicial nominees, the ads do not state that either Senator Feingold or Senator Kohl are members of that group, and none of the images displayed in WRTL's television advertisement suggest as much. In fact, the only reference to Senator Feingold is in the closing line of the advertisements, or "call-to-action line," asking the listener to contact *both* Senator Feingold and Senator Kohl to ask them to oppose judicial filibusters.[19] The ads do not promote, attack, support, or oppose either Senator, nor do they even reference in any way the Senators' past voting records, current positions, or previous public statements on the judicial filibuster issue. Thus, on the face of these ads, there is simply no way of telling whether either Senator had previously supported or opposed the filibuster or whether the Senators

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WRTL's references to its website have no bearing on this Court's constitutional analysis.

[19] As a member of the three-judge District Court in *McConnell*, Judge Leon concluded that "[t]he mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes." 251 F. Supp. 2d at 794. In support of this conclusion, he cited to several of the plaintiffs' witnesses in that case. For example, Paul Huard of the National Association of Manufacturers ("NAM") testified that the name of a particular Member of Congress generally must be mentioned "if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position." *Id.* (citation omitted). Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." *Id.* (citations omitted; alterations in original).

had split on the issue. Finally, it is important to note that the advertisements treat Senators Feingold and Kohl equally, even though Senator Kohl was not a candidate for federal office in 2004. Oddly enough, had WRTL wished to run these ads mentioning only Senator Kohl, and ignoring Wisconsin's other United States Senator, it could have done so without offending BCRA section 203.

Accordingly, for all of the above reasons, the Court finds that, on their face, WRTL's three 2004 anti-filibuster advertisements were not "intended to influence the voters' decisions," and thus, the Court need not analyze whether the ads *in fact* would have—or potentially could have—affected Senator Feingold's reelection. For even if the Court were to assume that WRTL's anti-filibuster ads "were likely to have had an effect on the Senate Election had they run during the electioneering communications period"[20] (Def.'s Opp'n to Mot. Summ. J. at 9), reliance on effect, without the requisite intent, would be the equivalent of permitting listeners' subjective impressions to justify the regulation of protected speech. This is precisely the type of analysis that *Buckley* and *Thomas* said should be avoided.

Thus, the Court concludes that WRTL's 2004 anti-filibuster ads are not the functional equivalent of express advocacy, and the Court must now turn to an evaluation of whether the Government has demonstrated the compelling state interest necessary to justify the degree to which BCRA section 203 burdens WRTL's First Amendment rights.

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[20] See our Circuit Court's discussion in its underlying opinion in *Buckley* v. *Valeo*, 519 F.2d 821, 875 (D.C. Cir. 1975), which recognized that: "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussion of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections."

IV. STRICT SCRUTINY ANALYSIS

In *McConnell*, the Supreme Court "easily" concluded, based on its prior decisions regarding campaign finance regulation, that there are compelling state interests that justify the regulation of express advocacy and its functional equivalent during the 30- and 60-day periods leading up to federal primary and general elections, respectively. 540 U.S. at 205. In particular, the Court pointed to its prior decisions in *Buckley* and *Bellotti*, where it spelled out the "unusually important interests [that] underlie the regulation of corporations' campaign-related speech," *id.* at 206 n.88, such as: preventing corruption, preserving the integrity of the electoral process, and preserving the public's confidence in its government, *id.* (citing *Bellotti*, 435 U.S. at 788-89).

The plaintiffs who prosecuted the facial challenge in *McConnell*, however, did not contest the Government's "compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office." *Id.* at 205. "Nor d[id] they contend that the speech involved in so-called issue advocacy is any more core political speech than are words of express advocacy." *Id.* Instead, they limited their attack to overbreadth, claiming that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications," *i.e.*, genuine issue ads that otherwise meet the requirements of BCRA section 203. *Id.* at 206.

The Supreme Court disagreed. It concluded that the justifications for the regulation of express advocacy (i.e., the compelling government interests) equally apply to issue ads aired during the proscribed statutory period "*if* the ads are intended to influence the voters' decisions and have that effect." *Id.* at 206 (emphasis added). Indeed, it characterized such issue ads as the "functional equivalent" of express advocacy. *Id.* Thus, even "assum[ing] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," *id.* at 206 n.88, the Supreme Court nonetheless held that BCRA section 203's ap-

plication to genuine issue ads was not substantial enough to strike down this section of the statute as facially unconstitutional.[21] By permitting as applied challenges to section 203's constitutionality, however, the Supreme Court has now put in play the question it left open in *McConnell* as to whether the government interests that justify regulating express advocacy and its functional equivalent also apply to the regulation of genuine issue ads. For the following reasons, this Court holds that they do not.

The common denominator between express advocacy and its functional equivalent, as the Supreme Court defined it in *McConnell*, is the link between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office.[22] Indeed, it is that very link which evinces, on the face of the ad, the intent to influence the election that the *McConnell* Court imposed as a critical requirement to functional equivalency. Conversely, it is the absence of that link that enables an issue ad to be fairly regarded as a genuine issue ad. More importantly, it is the ab-

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[21] In performing its substantial overbreadth analysis, the Supreme Court was willing to "assume[] that BCRA will inhibit some constitutionally protected corporate and union speech," but nevertheless concluded that "[such an] assumption would not 'justify prohibiting all enforcement' of the law unless its application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (quoting *Virginia* v. *Hicks*, 539 U.S. 113, 120 (2003)). Without determining the "precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose," *Id.* at 206, the Supreme Court concluded that "the vast majority of ads clearly had such a purpose." *Id.* In the final analysis, the Supreme Court held that plaintiffs failed to "carry their heavy burden of proving that amended FECA § 316(b)(2) is overbroad" because "[f]ar from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion." *Id.* at 207.

[22] *See McConnell*, 251 F. Supp. 2d at 796 (Leon, J.) ("It is the absence of a link between the advocacy of an issue and a candidate's fitness, or lack thereof, for election that renders congressional intervention with respect to genuine issue ads . . . unconstitutional.").

sence of that link which obviates the likelihood of political corruption and public cynicism in government where the ad, on its face, is devoid of any language the purpose of which is advocacy either for or against a particular candidate for federal office. Thus, while it may be theoretically possible to craft a genuine issue ad so subtly that it subconsciously encourages (or discourages) a potential voter to support a political candidate, there is no evidentiary or common sense basis to believe that such facially neutral ads are *necessarily* intended to affect an election, or will *necessarily* be viewed as such. Accordingly, in the absence of the Government demonstrating some other compelling interest to regulate genuine issue ads during the 30- and 60-day periods leading up to the federal primary and general election, the Court holds that Section 201's definition[23] as applied through section 203 to WRTL's 2004 antifilibustering issue ads is unconstitutional.

Turning to the Government's alternative bases for regulating genuine issue ads, the only other interest that the Government puts forward to justify BCRA section 203's regulation of WRTL's 2004 anti-filibuster advertisements is the interest in preserving section 201's "bright-line" rule. Yet the virtues of the bright-line rule surely cannot alone justify regulating constitutionally protected speech. The Supreme Court itself has already held that the "desire for a bright-line rule . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (emphasis in original). And its remand of our earlier decision to permit this as-applied challenge is a tacit acknowledgment that, notwithstanding the virtues of a bright-line test, there may nonetheless be some ads that are unconstitutionally captured by BCRA section 203. Thus, having concluded that WRTL's three 2004 anti-filibuster ads are such advertisements, we

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[23] *See supra* note 7.

are hard-pressed indeed to conclude that preserving section 201's bright-line rule is a sufficiently compelling interest to warrant the ongoing regulation of these ads under BCRA.[24]

CONCLUSION

For the foregoing reasons, the Court finds that (1) WRTL's 2004 anti-filibuster ads are neither express advocacy nor its functional equivalent; and (2) the Government has not articulated a sufficiently compelling interest to justify the burden that BCRA section 203 places on WRTL's First Amendment rights. Accordingly, the Court GRANTS plaintiff's Motion for Summary Judgment as it applies to the three broadcast advertisements WRTL intended to run in 2004 and DENIES defendants' cross-motions. An appropriate Order will issue with this Memorandum Opinion.

12/21/06
Date

/S/
DAVID B. SENTELLE
United States District Judge

12/21/06
Date

/S/
RICHARD J. LEON
United States District Judge

[24] Because we conclude that the Government has failed to demonstrate a compelling state interest in regulating WRTL's 2004 anti-filibuster ads, we need not address whether WRTL could/should have pursued other options for the financing of its advertisements or altered the content of its ads so as to avoid BCRA section 203's regulation altogether.

ROBERTS, District Judge, dissenting:

The majority employs a plain facial analysis of the text in WRTL's 2004 advertisements—ignoring the context in which the text was developed—to assess whether the ads are genuine issue ads which should escape BCRA's reach, or are regulable electioneering communications. This approach is inconsistent with *McConnell*, is inconsistent with this panel's own prior rulings, and finds little support in logic. Because a contextual analysis is warranted and discloses deep factual rifts between the parties concerning the purpose and intended effects of the ads, neither side is entitled to judgment as a matter of law, and I respectfully dissent from the majority's decision granting summary judgment to WRTL.

DISCUSSION

WRTL, the FEC and the intervenors have moved for summary judgment. Summary judgment may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Shekoyan* v. *Sibley*, 409 F.3d 414, 422 (D.C. Cir. 2005). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 248 (1986) (further holding that there is a genuine issue of material fact if the evidence is such that a reasonable jury could return a verdict for the non-moving party). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ." *Id.* at 255. In this case, in which parties have filed cross-motions for summary judgment, this panel must determine whether either party, as movant, has demonstrated that there is no dispute concerning the material facts that must be assessed to determine the constitutionality of § 203's prohibition as applied to WRTL's 2004 advertisements.

WRTL challenges § 203 as applied to its advertisements. "An as-applied challenge . . . requires an analysis of the facts of a particular case to determine whether the appli-

cation of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right." *Field Day, LLC* v. *County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006). WRTL argues that its ads are grassroots lobbying which should be exempt from BCRA's regulations because it is not electioneering communication. (Mem. in Supp. of Pl.'s Mot. Summ. J. ("Pl.'s Mot. Summ. J.") at 38.) WRTL asserts that even if this panel does not recognize a grassroots lobbying exemption,[25] its ads are genuine issue ads which are not the functional equivalents of regulable express advocacy. Because the Supreme Court acknowledged that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," *McConnell*, 540 U.S. at 206 n.88, WRTL maintains that as applied to its ads, § 203 is unconstitutional.[26]

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[25] Because one of the "cardinal rules governing federal courts . . . [is] never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985), there is no need to address the issue of whether a grassroots lobbying exemption should be carved out. In 2006, the Supreme Court remanded this case to this three-judge panel with the instruction that this panel "consider the merits of WRTL's as-applied challenge in the first instance." *Wis. Right to Life* v. *Fed. Election Comm'n*, 126 S. Ct. 1016, 1018 (2006). The remand did not order this panel to adopt a definition of advertising that could be considered grassroots lobbying or genuine issue advocacy, definitions never offered by the Supreme Court. Instead, this panel was expected to use *McConnell*'s holding that § 203 was not facially unconstitutional and determine if WRTL's ads should, nonetheless, not be regulated by BCRA. The responsibility of this panel is to determine if WRTL's 2004 ads, which do not purport to be express advocacy, can still be constitutionally regulated, not to identify the contours of advertising that is grassroots lobbying or genuine issue advocacy. *See Ctr. for Individual Freedom* v. *Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006) ("*McConnell* states only that a campaign finance regulation can cover issue advocacy and nevertheless be constitutional so long as the regulation is 'closely drawn' to match a 'sufficiently important' government interest . . . and is not vague." (internal citations omitted)).

[26] WRTL suggests that the remand in this case makes clear that the Supreme Court has permitted as-applied challenges "regarding communications that necessarily fall within the prohibition periods or there would [be] no as-applied challenges at all." (Pl.'s Opp'n to Def.'s Mot. to Compel

The FEC and the intervenors argue that WRTL's ads are electioneering communications that are properly regulable under BCRA, and that a grassroots lobbying exemption would threaten the Supreme Court's ruling in *McConnell*. (Def.'s Mem. in Supt. of Mot. Summ. J. ("Def.'s Mot. Summ. J.") at 1, 21, 26.) They claim that the ads were intended to influence the votes in the 2004 Senate election and fit the very type of activity that *McConnell* found Congress had a compelling interest in regulating. The defendants also assert that the ads were designed and timed to set up a legal challenge to the BCRA and thus were not genuine issue ads entitled to be funded by corporate funds.

I. McCONNELL

McConnell upheld the validity of the electioneering communication definition in § 203 of BCRA over a First Amendment challenge. Noting that "[g]overnment has a compelling interest in regulating advertisements that expressly advocate for the election or defeat of a candidate for federal office," *McConnell*, 540 U.S. at 205, the *McConnell* Court cited numerous values relating to this interest, including "'[p]reserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.'" *Id.* at 206 n.88 (quoting *First Nat'l Bank* v. *Bellotti*, 435 U.S. at 788-89). Although the Court recognized the existence of genuine issue ads, it nevertheless held that some issue advertisements could fall within the category of electioneering communications to be regulated by BCRA.[27] *McConnell*, 540 U.S. at 206. Using the

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at 5.) The Supreme Court did not state that there had to exist an as-applied challenge that would succeed; it merely held that "in upholding § 203 against a facial challenge, [it] did not purport to resolve future as-applied challenges." *Wis. Right to Life*, 126 S. Ct at 1018.

[27] The Court found little difference "between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *McConnell*, 540 U.S. at 126-27.

Bill Yellowtail advertisement as an example, the Court explained that "although . . .advertisements [may] not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id.* at 193.[28] *McConnell* held that § 201's electioneering communication was narrowly tailored to meet a compelling government interest. In its constitutional analysis of § 203, the Court described viable alternatives for organizations seeking to broadcast "genuine issue advertising" without running afoul of the electioneering communication provision: "corporations and unions may finance genuine issue ads . . . [during prohibited periods] by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206.

II. FACIAL ANALYSIS

The landscape of campaign finance law has been changed by BCRA and *McConnell*. There is no longer a bright line rule for distinguishing between express advocacy and genuine issue advocacy to determine which may be constitutionally regulated. Courts can no longer rely on *Buckley* v. *Valeo*'s magic words test to determine whether the advert sing at issue is electoral advocacy, namely whether certain election-related words are present or absent. *Id.*, 424 U.S. at 43-44 & 44 n.52. Before *McConnell*, some judicial sentiment disfavored examining the context rather than the

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[28] A group called "Citizens for Reform" sponsored an advertisement during the 1996 Montana congressional race in which Bill Yellowtail was a candidate. The advertisement stated: "'Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But her "nose was not broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.'" *McConnell*, 540 U.S. at 194 n.78 (internal citation omitted). The Court said that "[t]he notion that this advertisement was designed purely to discuss the issue of family values strains credibility." *Id.*

literal text of election ads.[29] For example, *North Carolina Right to Life, Inc.* v. *Leake*, 344 F.3d 418 (4th Cir. 2003), held unconstitutional a provision of a North Carolina campaign reform statute that allowed a contextual examination of an advertisement to determine its status as express advocacy: "This circuit . . . has consistently interpreted *Buckley* as allowing regulation 'only if it [is] limited to expenditures for communications that literally include *words which in and of themselves* advocate the election or defeat of a candidate.'" *Id.* at 425 (internal citations omitted). There is no doubt, though, that *McConnell* has unsettled those sentiments. *Leake* was vacated and remanded by the Supreme Court in light of its *McConnell* decision. *Leake* v. *North Carolina Right to Life, Inc.*, 541 U.S. 1007 (2004).

That *Leake* was vacated comes as no surprise. The *McConnell* Court assessed the subjective intention of the advertising before it in deciding that § 201 was not overly broad. The Court evaluated ads which their proponents claimed were genuine issue advertising with no electioneering purpose and nevertheless concluded that although an advertisement may not plainly promote or attack a candidate, it may still be "clearly *intended* to influence the election." *McConnell*, 540 U.S. at 193 (emphasis added) (further stating that "[f]ar from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion."). In discussing the record, the *McConnell* Court specifically examined both the purpose of the ads before it as well as their impact on the relevant election. "The precise percentage of issue ads that clearly identified a candidate and were aired

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[29] That sentiment was not unanimous. *See Federal Election Comm'n* v. *Furgatch*, 807 F.2d 857, 863-64 (9th Cir. 1987) (holding that in the realm of express advocacy, although context is a limited concern especially when assessing the impact of the speech itself, it nonetheless "is relevant to a determination of express advocacy. A consideration of the context in which speech is uttered may . . . supply necessary premises that are unexpressed but widely understood by readers or viewers.").

during those relatively brief pre-election timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court.... Nevertheless, the vast majority of ads clearly had such a *purpose*." *Id.* at 206 (emphasis added) (further stating that "justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are *intended* to influence the voters' decisions and have that *effect*." (emphases added)).

The majority does not believe that this panel should engage in a contextual analysis, claiming that such an inquiry is foreclosed by the Supreme Court's holdings in *Buckley* and *Thomas*. My colleagues quote language in *Thomas* to suggest that an intent- and effect-based inquiry into whether or not an advertisement is express advocacy will create ambiguity and uncertainty on the part of the speaker. They suggest that a facial analysis of whether the advertisement, among other things, promotes or attacks the named candidate, is appropriate and that any other course of action is impractical and undesirable. However, the *McConnell* Court looked precisely to the purpose and effect of advertising in a facial challenge to the constitutionality of the electioneering communication provision, and there is no logical reason why this panel should not engage in such an analysis for an as-applied challenge. *See Alaska Right to Life Comm.* v. *Miles*, 441 F.3d 773, 785-86 (9th Cir. 2006) (citing *McConnell* for the proposition that an advertisement's effect matters in both a facial and an as-applied challenge for overbreadth to an Alaska campaign finance law). A purpose- and effect-based inquiry seems necessary to determine if WRTL's ads are genuine issue ads or are instead express or sham issue advocacy because the "presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *McConnell*, 540 U.S. at 193.

The majority also appears to blur the Supreme Court's prohibition on employing a test that involves the subjective intent of the *listener* and one that involves the subjective

intent of the *advertiser*. *See McConnell* v. *Fed. Election Comm'n*, 251F. Supp. 2d at 568 (opinion of Kollar-Kotelly, J.) ("[T]he Supreme Court made clear that a test distinguishing between a discussion of the issues and a discussion of candidates that relied on the subjective intent of the listener was problematic"). In *Thomas*, the Court criticized a test based upon an "understanding of the hearers," but drew no conclusion about whether the speaker's purpose could be used to examine the nature of the speech. The majority cites no precedent holding that there maybe no inquiry into the subjective intent of the speaker in determining the type of speech made.[30]

In ignoring the context in which the advertisements were developed, the majority also takes a sharp turn from its own prior rulings. Two years ago, this panel unanimously found that WRTL had failed to establish a likelihood of success on the merits and denied its motion for injunctive relief,

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[30] Indeed, criminal statutes enacted by Congress punish conduct or speech based upon a prohibited intent or purpose of the speaker. *See, e.g.*, 18 U.S.C. §§ 245(b)(1), (4), 248(a)(1), 42 U.S.C. § 3631(b), (c) (threat with the purpose of intimidating someone from engaging in protected activities); 18 U.S.C. § 288 (false statement for purpose of obtaining payment on false postal indemnity claim); 18 U.S.C. §§ 875(b), (d), 876(b), (d), 877 (threat to injure with intent to extort); 18 U.S.C. § 1033(a)(1) (false statement with intent to deceive insurance regulator); 18 U.S.C. § 1583 (persuading another to go to another place with intent to make him a slave); 18 U.S.C. § 1860 (verbal intimidation for the purpose of hindering land purchase). Among them are statutes that have survived First Amendment challenges. *See, e.g., United States* v. *Dinwiddie*, 76 F.3d 913, 922, 925 (8th Cir. 1996) (18 U.S.C. § 248, stating that a court "must analyze an alleged threat in light of its entire factual context" (internal citation omitted)); *accord Terry* v. *Reno*, 101 F.3d 1412, 1418 (D.C. Cir. 1996); *United States* v. *Gregg*, 226 F.3d 253, 267 (3d Cir. 2000) (collecting cases upholding 18 U.S.C. § 248 against a First Amendment challenge); *United States* v. *Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988) (18 U.S.C. § 876); *United States* v. *Cassel*, 408 F.3d 622, 634-35 (9th Cir. 2005) (18 U.S.C. § 1860). *Cf. Virginia* v. *Black*, 538 U.S. 343, 363 (2003) (noting that "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation").

stating that "[t]he facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Wis. Right to Life* v. *Fed. Election Comm'n*, Civil Action No. 04-1260, 2004 WL 3622736, at *3 (D.D.C. Aug. 17, 2004). We explicitly found and cited contextual facts as relevant to our conclusion discounting the likelihood of finding any constitutional infirmity in BCRA's regulation of the WRTL advertisements.[31]

After the remand from the Supreme Court, this panel more than once took a clear position favoring contextual analysis when the parties voiced sharp disagreement over what if any discovery would be relevant to the merits of WRTL's complaint. The FEC and the intervenors proposed a briefing schedule that contemplated conducting discovery into a variety of issues regarding the purpose and effect of WRTL's 2004 advertisements. (Def.'s Opp'n to Pl.'s Mot. to Reinstate, Order Supp. Briefing, and Expedite Cross-Mots. Summ. J. at 3-4; Def.'s Mem. in Support of Rule 16 Proposal for Disc. and Summ. J. at 3; Intervenors' Mem. in Support of Def.'s Rule 16 Proposal for Disc. and Summ. J. at 1-2.) WRTL urged that such discovery bearing on context was flatly irrelevant, and insisted that the constitutional question turns solely upon the content of the communication itself, making discovery unnecessary. (Pl.'s Reply Mem. in Supp. of Mot. to Reinstate, Order Supp. Briefing, and Expedite Cross-Mots. for Summ. J. ("Pl.'s Reply Mem.") at 4, 8.) This panel unanimously rejected WRTL's position and ordered a period of discovery "into the purpose and effect of plaintiff's

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[31] We found that Senator Feingold's opponents used as a campaign issue over a year before the election his support of filibusters against judicial nominees; that WRTL's PAC endorsed in March 2004 three candidates opposing Senator Feingold and announced his defeat as a priority; and that WRTL criticized in a July 2004 news release Senator Feingold's record on Senate filibusters against judicial nominees. *Wis. Right to Life* v. *Fed. Election Comm'n*, Civil Action No. 04-1260, 2004 WL 3622736, at *1 (D.D.C. Aug. 17, 2004). We did not depart from those findings on May 10, 2005, when we unanimously dismissed WRTL's case.

2004 advertisements for the 2004 campaign[,]" among other topics. (Scheduling Order of Apr. 17, 2006 at 2.) And when WRTL later resisted discovery into to the purpose and effect of its 2004 advertisements (Def.'s and Intervenors' Mot. To Compel Produc. of Docs., Reqs. to Admit, Resps. to Interrogs. ("Def.'s Mot. to Compel")) at 1-2) as irrelevant and arguing that the constitutionality of BCRA's application to speech depends only upon the text rather than the context of the speech (Pl.'s Opp'n to Def.'s Mot. To Compel Produc. of Docs., Reqs. to Admit, Resps. to Interrogs. at 5, 8), this panel unanimously compelled WRTL to respond to all of the twenty-two discovery requests propounded either fully or with minor modifications. (Def.'s Mot. to Compel at 5-6, 9-19 21-22; Order, Aug. 18, 2006.)

Our repeated decisions requiring inquiry into the context in which the advertisements were developed were right then, and they are right now. The majority now brushes them aside and adopts the very approach that it squarely and repeatedly rejected. It partly justifies using its facial analysis approach for reasons of judicial manageability, *supra* at 17-18, a basis for decision that even the plaintiff rejects. (Pl.'s Reply Mem. at 8 (stating that in selecting a proper analytical standard, "constitutional mandates clearly outweigh . . . judicial manageability").)

Any analysis of whether WRTL's ads are genuine issue ads should be achieved through assessing the ads' context and WRTL's purpose or intent in broadcasting the ads.

CONTEXTUAL ANALYSIS

I. EXPRESS ADVOCACY

WRTL claims that its ads are not express advocacy because they do not "expressly advocate for the election or defeat of a candidate for federal office." *McConnell*, 540 U.S. at 205. WRTL instead maintains that its ads are grassroots lobbying that discusses legislative concerns. Although WRTL acknowledges that its ads may have an impact on the outcome of federal elections, it claims that their primary purpose is to "focus on [a] legislative issue in question, not

on any candidate" (Pl.'s Mot. Summ. J. at 10), and to "influenc[e] the votes of Senators Feingold and Kohl" before Congress adjourned. (Am. Ver. Compl. ¶ 12.) However, a genuine issue of material fact exists as to whether WRTL intended its ads to expressly advocate for the defeat of Senator Feingold.

Although the ads at issue do not explicitly encourage their listeners or viewers to oppose Senator Feingold, they do state that "[a] group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' .... Contact Senators Feingold and Kohl and tell them to oppose the filibuster." (Ver. Compl., Ex. A.) The structure of the ads further suggests that Senator Feingold might be one of the "group of Senators . . .causing gridlock and backing up some of our courts to the state of emergency." (*Id.*) Notably, the ads provide the listeners or viewers with no direct contact information for the Senators; instead, the ads direct the listeners or viewers to a website created by WRTL, www.befair.org, which featured e-alerts that "excoriat[ed]" Senator Feingold on the filibuster issue. (Def.'s Mot. Summ. J. at 29; Ex. 2 ¶ 21.) Thus, even a textual approach could suggest that if the ads were broadcast during BCRA's prohibited period, they might have implicitly discouraged Senator Feingold's re-election.

WRTL's role in the political environment that wrought the ad campaign in the first place could be probative of the intent of the ads. WRTL has opposed Senator Feingold since his election in 1992 and has used expenditures from its federal political action committee ("PAC") to support his political opponents. (*Id.*, Exs. 11, 12.) In 1998, WRTL spent more than $60,000 on independent expenditures to oppose Senator Feingold's reelection to a second term. (*Id.*, Ex. 11.) In 2004, Senator Feingold's reelection campaign coincided with the presidential election, and WRTL declared its "resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!" (*Id.*, Ex. 21.) WRTL made the defeat of Feingold "a priority." *Wis. Right to Life*, Civil Action No. 04-1260, 2004 WL 3622736, at

*1. WRTL endorsed through its PAC three of Senator Feingold's main opponents. (*Id.*, Ex. 54.) WRTL spent $7,500 on political literature that both supported Senator Feingold's opponents and explicitly opposed Senator Feingold (Intervenors's Opp'n to Pl.'s Mot. Summ. J. at 4-5), including a press release exhorting that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections." (*Id.*, Ex. 54.) WRTL's Executive Director Mary Lyons stated that the organization's "greatest challenge for 2004" was "to finish strongly in the elections," by "retir[ing] Senator Feingold." (*Id.*, Ex. 24 at 3.) The website referred to in the advertisements at issue, www.befair.org, explicitly attacked Feingold's record and encouraged website readers to defeat him. (*Id.*, Ex. 54.)

Senator Feingold's participation in judicial filibustering was a particular focus of criticism by WRTL, which distributed a voter guide endorsing one of Feingold's opponents who pledged to allow judicial nominees an up or down vote. (Def.'s Mot. Summ. J., Exs. 15 at 3, 24.) In the fall of 2004, WRTL's federal legislative director, Douglas Johnson acknowledged that "it would certainly help if a few of the pro-abortion, pro-filibuster Democratic senators were replaced by pro-life Republicans, and that could happen." (Def.'s Mot. Summ. J., Ex. 24 at 5.) Senator Feingold's opponents also saw the filibuster issue as a key campaign issue. (*Id.*, Ex. 15 at 3-4.) One of Senator's Feingold's key opponents, Bob Welch, characterized Feingold's support of filibustering as partisan, calling "[t]he gridlock caused by Russ Feingold's partisanship . . . appalling . . . . Because of his obstructionism the wheels of justice are grinding to a halt." (*Id.*, Ex. 13.)

The reason for WRTL's shift to broadcast advertising and the import of its timing are in dispute. Through early 2004, WRTL used non-broadcast means to convey its criticism of Senate filibusters of President Bush's judicial candidates. (Def.'s Mot. Summ. J., Ex. 3 at 62-63.) Although filibusters of judicial nominees had occurred before then, WRTL had not run any broadcast advertisements on the issue before then. (*Id.*, Ex. 3 at 82.) However, around May

of 2004, WRTL began planning a series of advertisements in opposition to filibustering. (PL's Mot. Summ. J. at 6.) WRTL claims its shift to broadcast ads was because they were "the most effective form of communication for the present grass-roots lobbying campaign[.]" (Am. Ver. Compl. ¶ 51.) WRTL began broadcasting its advertisements on July 26, 2004, but stopped running those advertisements on August 15, 2004 because it believed that on that date, its ads would become prohibited electioneering communications as to Senator Feingold. (*Id.* ¶¶ 12, 14, 52.) WRTL claims it expected that filibuster votes would occur during times in which electioneering communications were regulated under BCRA (*id.* ¶ 6), namely, after August 15, 2004. In fact, the advertisements began airing in July, days after the last of the judicial filibuster cloture votes had occurred during that session and the Senate had departed for a six-week recess. (Def. Mot. Summ. J., Def.'s Stmt. Mat. Facts ("Def.'s Stmt. Mat. Facts") ¶ 69; Def.'s Mot. Summ. J., Ex. 35.) WRTL did not run any additional anti-filibustering ads after the 2004 election (Def.'s Mot. Summ. J., Ex. 48 at 8-10) in either 2004 or in 2005 during the height of the controversy. (*Id.* at 8.) The FEC insists that WRTL's decision to begin an advertising campaign after the votes defeated the purpose of the campaign especially because "both WRTL's employee in charge of grass roots lobbying and its advertising agency lead consultant believe that it is important to run grassroots lobbying advertising shortly *before* legislative votes are to occur." (*Id.* at 8; Ex. 4 at 112; Ex. 5 at 30-31.)

The FEC argues that WRTL's ads are neither grassroots lobbying nor genuine issue ads; instead, they are express advocacy meant to encourage constituents to oppose Senator Feingold. Because of the timing of the ads, the defendants assert that the ads were intended to have an effect on the election and would have had such an effect if WRTL had run them during BCRA's prohibited electioneering communication period. The FEC maintains that "because the ads portray Senator Feingold in a negative light and clearly would influence the outcome of the election for which he was campaigning . . . [they] would have been one of the

many messages that created an impression about Senator Feingold in the weeks before the election that would have informed voters' decisions about the upcoming election." (*Id.* at 10.)

The intent of the advertising campaign is a genuine issue of material fact, and neither side persuasively argues that no dispute about intent exists. WRTL claims that its 2004 broadcast advertising was generated by its opposition to judicial filibustering. The FEC counters that the advertising was meant to oppose Senator Feingold and was timed to affect the election, not any filibuster votes. WRTL insists that the timing of the campaign was geared toward a "Fall Showdown" in November 2004 which did not occur. (Pl.'s Mot. Summ. J. at 4.) The timing issue alone requires that this case not be disposed of on summary judgment.

II. SHAM ISSUE ADS

The FEC argues that even if this panel does not find that WRTL's advertising was express advocacy, the advertising campaign was intended to spark a lawsuit challenging the BCRA, making it sham issue advocacy. WRTL instead states that its advertising was "bona fide" grassroots lobbying that "expressed an opinion on pending Senate legislative activity, which was imminently up for a vote, and urged listeners to contact their Senators and to urge them to vote a certain way in the upcoming vote." (*Id.* at 10.) A genuine issue of material fact exists as to whether the advertising was intended to challenge BCRA, which would make the advertising sham issue advocacy.

The FEC notes that although WRTL had previously engaged in a number of different issue campaigns in the past, the judicial filibustering campaign was "distinct from the other activities of e-mailing [WRTL's] supporters." (Def.'s Mot. Summ. J., Ex. 4 at 105.) The FEC contends that WRTL's Executive Director was aware of the restrictions imposed by BCRA and was "hopeful that she would be able to get an exception [from the court] and continue running those ads." (*Id.*, Ex. 5 at 42.) The FEC's evidence, uncon-

tested by WRTL, could suggest that the potential for the lawsuit shaped how the advertising campaign was coordinated and conducted. Jason Vanderground, a brand consultant hired to work on the filibustering campaign testified in his deposition that the impending lawsuit was discussed among members of WRTL's advertising team and he did research regarding the minimum number of households an ad would have to reach in order to trigger the BCRA ban. *See* 2 U.S.C. § 434(f)(3)(C). He also researched the legal parameters of BCRA because he knew that "we were going to be creating advertising that would fall within what some of those laws addressed." (*Id.*, Ex. 5 at 47.) The contingency plan if this panel did not allow the ads to go forward was to "draw attention to the fact that the campaign was not allowed back on the air" by attacking the BCRA. (*Id.*, Ex. 5 at 84.) Vanderground also planned the advertising for a national market, which could make suspect WRTL's claim that the focus of its advertising was to encourage Wisconsin voters to call their Senators. The FEC argues that the actual goal was to spur a lawsuit that would have a national impact.

The parties also agree that language regarding the BCRA figured prominently, at least initially, in the judicial filibustering campaign. Vanderground proposed putting information on WRTL's *befair* website about both the judicial filibuster issue and "campaign finance reform." (*Id.*, Ex. 5 at 58.) Initial draft press releases primarily addressed the impact of the BCRA; Executive Director Lyons noted that one draft "is more about the BCRA than the filibuster." (*Id.*, Ex. 33 at 2.) This evidence fairly raises factual questions concerning the genesis of the ads as genuine issue ads.

The FEC asserts that WRTL chose to raise money for its general fund rather than its PAC. It argues that WRTL made a conscious decision not to possess in its PAC the requisite amount of funds needed for the advertising campaign. (Def.'s Stmt. Mat. Facts ¶¶ 112-21.) WRTL raised over $315,000 from corporations for its general fund in 2004. (Def.'s Mot. Summ. J. at 10.) Although WRTL's PAC raised approximately $155,000 in the 1999-2000 election cycle, it

had $13,766.90 in its coffers in 2004. WRTL claims that raising PAC money is difficult being "subject to source, amount, disclosure requirements, and donor resistance to such contributions." (Pl.'s Mot Summ. J. at 12.) It also asserts that it could not have raised the requisite PAC funds to pay for the advertising campaign (*id.*, Ex. 1 ¶¶ 8, 11) even if it did not spend PAC money on other independent expenditures and contributions. However, the FEC retorts that PAC receipts nationally increased approximately 50% during the period between the 1999 and 2004 election cycles and "WRTL has provided no reason why fundraising was harder for its PAC than everybody else." (Def.'s Mot. Summ. J. at 11; Def.'s Stmt. Mat. Facts ¶ 117.) A permissible inference is that WRTL was unwilling to raise funds for its PAC so it would be forced to fund electioneering communications through its general fund and could create a challenge to the BCRA.

This evidence reveals a genuine dispute as to whether WRTL intended to use its advertisements as a test case, rendering them "sham" issue advocacy.

CONCLUSION

A genuine issue of material fact exists as to whether WRTL's 2004 advertisements were intended to influence a Senate election, or to spark litigation, or to be genuine issue ads. Because a resolution of that dispute is necessary—rather than a mere facial assessment of the ads' text—to determine whether BCRA may properly regulate the ads, this case cannot be resolved on cross-motions for summary judgment. Therefore, I respectfully dissent from the majority' s grant of summary judgment to WRTL.

12/21/06
Date

/s/
RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

and

SEN. JOHN MCCAIN, *ET AL.*

Intervenor-Defendants.

Civ. No. 04-1260 (DES, RWR, RJL)
Three-Judge Court
[FILED DEC 28, 2006]

ORDER
(December 28, 2006)

This matter having come before the Court upon the Federal Election Commission's motion for clarification and the Court having considered the motion, it is hereby

ORDERED that [#142] the Federal Election Commission's motion for clarification is GRANTED; and it is further

ORDERED that, there being no just reason to delay an appeal, the Order entered on December 21, 2006 is a final appealable order as to those issues decided in the opinion accompanying that order.

SO ORDERED.

/s/
DAVID B. SENTELLE
United States Circuit Judge

/s/
RICHARD W. ROBERTS
United States District Judge

/s/
RICHARD J. LEON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,
Plaintiff,

v.

FEDERAL ELECTION COMMISSION,
Defendant,

and

SENATOR JOHN MCCAIN,
REPRESENTATIVE TAMMY BALDWIN,
REPRESENTATIVE CHRISTOPHER SHAYS, AND
REPRESENTATIVE MARTIN MEEHAN,
Intervenor-Defendants.

Civ. No. 04-1260 (DBS, RWR, RJL)
Three-Judge Court
[FILED: DEC 29, 2006]

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Intervenor Defendants Senator John McCain, Representative Tammy Baldwin, Representative Christopher Shays, and Representative Martin Meehan hereby give notice that they appeal to the Supreme Court of the United States from the decision entered in this action on December 21, 2006, and the order entered on December 28, 2006.

This appeal is taken pursuant to Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 114 (Public Law 107-155) (providing for direct appeal to the Supreme Court of the final decision of a three-judge district court).

Dated this 29th day of December, 2006.

Respectfully submitted,

/s/

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SUPREME COURT OF THE UNITED STATES

No. 04-1581

WISCONSIN RIGHT TO LIFE, INC.,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Jan. 23, 2006

PER CURIAM

The Bipartisan Campaign Reform Act of 2002 (BCRA), § 203, 116 Stat. 91, prohibits corporations from using their general treasury funds to pay for any "electioneering communications." 2 U.S.C. § 441b(b)(2) (2000 ed., Supp. III). BCRA § 201 defines "electioneering communications" as any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office. 2 U.S.C. § 434(f)(3). Appellant Wisconsin Right to Life, Inc. (WRTL) brought this action against the Federal Election Commission (FEC), seeking a judgment declaring BCRA unconstitutional as applied to several broadcast advertisements that it intended to run during the 2004 election. WRTL also sought a preliminary injunction barring the FEC from enforcing BCRA against those advertisements. WRTL does not dispute that its advertisements are covered by BCRA's definition of prohibited electioneering communications. Instead, it contends that BCRA cannot be constitutionally applied to its particular communications because they constitute "grassroots lobbying advertisements." Although the FEC has statutory authority to

exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here.

The three-judge District Court denied the motion for a preliminary injunction and subsequently dismissed WRTL's complaint in an unpublished opinion. We noted probable jurisdiction, 545 U.S. ----, 126 S.Ct. 36, 162 L.Ed.2d 932 (2005). Appellant asks us to reverse the judgment of the District Court because that court incorrectly read a footnote in our opinion in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491, (2003), as foreclosing any "as-applied" challenges to the prohibition on electioneering communications. We agree with WRTL that the District Court misinterpreted the relevance of our "uphold[ing] all applications of the primary definition" of electioneering communications. *Id.*, at 190, n. 73, 124 S.Ct. 619. Contrary to the understanding of the District Court, that footnote merely notes that because we found BCRA's primary definition of "electioneering communication" facially valid when used with regard to BCRA's disclosure and funding requirements, it was unnecessary to consider the constitutionality of the backup definition Congress provided. *Ibid.* In upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges.

The FEC argues that the District Court also rested its decision on the alternative ground that the facts of this case "suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." No. 04-1260 (DC, Aug. 17, 2004), App. to Juris. Statement 8a. It is not clear to us, however, that the District Court intended its opinion to rest on this ground. For one thing, the court used the word "may." For another, its separate opinion dismissing WRTL's challenge with prejudice characterized its previous opinion as holding that "WRTL's 'as-applied' challenge to BCRA is foreclosed by the Supreme Court's decision in *McConnell*." *Id.*, at 3a. Given this ambiguity, we cannot say with certainty that the

District Court's dismissal was based on this alternative ground.

We therefore vacate the judgment and remand the case for the District Court to consider the merits of WRTL's as-applied challenge in the first instance.

It is so ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civ. No. 04-1260 (DBS, RWR, RJL)
Three-Judge Court
[FILED MAY 10, 2005]

MEMORANDUM OPINION AND ORDER

In the present action, plaintiff Wisconsin Right To Life, Inc. ("WRTL") seeks a judgment declaring portions of the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), unconstitutional as applied to it under the facts set forth in its complaint. WRTL also sought preliminary injunctive relief preventing the defendant, Federal Election Commission ("FEC"), from enforcing the contested portions of BCRA against it.

On August 17, 2004, the Court denied WRTL's motion for preliminary injunctive relief. In denying WRTL's motion, the Court held that "the reasoning of [the Supreme Court in *McConnell* v. *Federal Election Commission*, 124 S. Ct. 619 (2003)] leaves no room for the kind of 'as-applied' challenge" to BCRA asserted by WRTL, even though the *McConnell* Court "was considering a facial challenge" Mem. Op. at 4. After denying WRTL's motion, the Court ordered the parties to submit supplemental memoranda addressing the issue of whether the case should be dismissed in light of the Court's ruling. The issue now ripe for review, and after

due consideration of the parties' supplemental memoranda and the entire record herein, the Court for the reasons set forth in its prior opinion holds that WRTL's "as-applied" challenge to BCRA is foreclosed by the Supreme Court's decision in *McConnell*. Accordingly, WRTL's case is dismissed with prejudice.

This the 9th day of May, 2005.

/s/
DAVID B. SENTELLE
United States Circuit Judge

/s/
RICHARD W. ROBERTS
United States District Judge

/s/
RICHARD J. LEON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civ. No. 04-1260 (DBS, RWR, RJL)
Three-Judge Court
[FILED AUG 17, 2004]

MEMORANDUM OPINION AND ORDER

This matter coming before the court on plaintiff's motion for a preliminary injunction, and the court having considered the affidavits and representations of counsel, solely for the purposes of the motion for a preliminary injunction, the court makes the following findings of fact:

1. Plaintiff Wisconsin Right to Life, Inc. (WRTL) is a nonprofit, nonstock, Wisconsin, ideological advocacy corporation recognized by the Internal Revenue Service as tax-exempt under § 501(c)(4) of the Internal Revenue Code.

2. Defendant Federal Election Commission (FEC) is the government agency charged with enforcing the relevant provisions of the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA).

3. WRTL admits that it does not qualify for any exception permitting it to pay for electioneering communications from corporate funds because (a) it is not a "qualified nonprofit corporation" (QNC) within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication

prohibition and (b) its advertisements are "targeted" so that it does not fit the exception for § 501(c)(4) organizations as described in 2 U.S.C. § 441b(c)(2). 2 U.S.C. § 441b(c)(6)(A).

4. U.S. Senator Russell Feingold of Wisconsin is running for reelection this year.

5. As early as September, 2003, candidates opposing Senator Feingold made Senator Feingold's support of Senate filibusters against judicial nominees a campaign issue. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. (Def.'s Opp'n) Exh. 10-14.

6. WRTL maintains a political action committee (PAC).

7. In March 2004, WRTL's PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority. Def.'s Opp'n Ex. 4, 5, 6, 7.

8. In a news release on July 14, 2004, WRTL criticized Senator Feingold's record on Senate filibusters against judicial nominees. Def.'s Opp'n Exh. 16.

9. WRTL had used a variety of non-broadcast communications to convey its criticism of Senate filibusters against judicial nominees in the months leading up to August 2004.

10. WRTL is now paying to broadcast on television and radio a series of advertisements inclusive of those depicted in Exhibits A, B, and C to the complaint and attached as Exhibits A, B, and C hereto, all of which refer to and will continue to refer to and clearly identify Senator Russell Feingold.

11. The Wisconsin primary for the office for which Senator Feingold is a candidate will occur thirty days after August 15, 2004. The general election will occur November 2, 2004.

12. WRTL anticipates that its ongoing advertisements will be considered electioneering communications for purposes of federal statutory and regulatory definitions under 2

U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29 during the period between August 15, 2004, and November 2, 2004.

LEGAL CONCLUSIONS AND ANALYSIS

Plaintiff Wisconsin Right to Life seeks a judgment declaring portions of the BCRA unconstitutional as applied to it under the facts set forth in its complaint, and it seeks preliminary injunctive relief preventing FEC enforcement of those portions of BCRA against it.

The focus of the litigation is 2 U.S.C. § 441b, which regulates the extent to which such corporations as WRTL may finance and produce "applicable electioneering communications," which are defined at 2 U.S.C. § 434(f)(3) as being "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general . . . election . . .; or (bb) 30 days before a primary . . . election; and (III) . . . is targeted to the relevant electorate."

In this case, WRTL cites three specific ads, first aired July 26, which contain references to Sen. Russell Feingold, currently the sole Democrat contender for the Senate seat. Complaint 5. As the primary election occurs on September 14 and the general election occurs on November 2, BCRA's (in this case, overlapping) "blackout" periods prohibit the airing of the advertisements from August 15 until November 2. *Id.* at 6.

WRTL's prayer for relief is sweeping, seeking both declaratory and injunctive relief declaring 2 U.S.C. § 441b unconstitutional as applied to "electioneering communications . . . that constitute grass-roots lobbying," and specifically as applied to the three advertisements incorporated in its complaint. Complaint 13. However, the motion before us today concerns only its motion for a preliminary injunction. The standards for the granting of a preliminary injunction are familiar. To prevail, a plaintiff seeking such relief must demonstrate: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable harm if an injunction is not granted; (3) that an injunction would not cause

substantial injury to other parties; and (4) that the public interest would be furthered by the injunction. *See, e.g., CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). Plaintiff's showing in the present litigation cannot survive this standard.

First, WRTL has not established that it has a substantial likelihood of success on the merits. Just last year, in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003), the Supreme Court upheld the electioneering communication provisions of the BCRA in their entirety. *Id.* at 686-700. WRTL is correct that in *McConnell* the Court was considering a facial challenge while the current challenge subjects the statute to constitutional analysis in the context of its specific application, but the reasoning of the *McConnell* Court leaves no room for the kind of "as applied" challenge WRTL propounds before us. More specifically, the Court noted that the statute included a "back up" definition of electioneering communications, 2 U.S.C. § 434(f)(3)(A)(I), to take effect only if the primary definition were held to be "constitutionally insufficient." The Court expressly stated that it need not rule on the constitutionality of that back up provision because "*we uphold all applications of the primary definition* and accordingly have no occasion to discuss the backup definition." 124 S.Ct. at 687 n.73 (emphasis added). The Court's deliberate declaration of its ruling as encompassing "*all applications* of the primary definition" suggests little likelihood of success for an "as applied" challenge to some applications of that definition, such as the one plaintiff brings before us.

Furthermore, the Court's deliberate upholding of "all applications" stands in informative contrast to its explicit acknowledgment that other parts of the statute which it upheld against facial challenge might be subject to "as applied" challenges in the future. For example, the Court upheld a Title I provision of BCRA restricting state parties from spending "soft money for federal election activities." 2 U.S.C. § 441i(b). But the Court stated that "as-applied challenges remain available" if some future state party could

show that the restriction had become "'so radical in effect as to . . . drive the sound of [the recipient's] voice below the level of notice.'" *Id.* at 677 (brackets in the original) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000)). Similarly, in upholding the ban on soft money fundraising by national party committees, 2 U.S.C. § 441i(a), the Court noted that "'a nascent or struggling minor party can bring an as-applied challenge" should the ban prevent it from "amassing the resources necessary for effective advocacy.'" *Id.* at 669 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

Again, in upholding the Title V recordkeeping requirement on broadcasters, the Court noted that the regulated entities "remain free to challenge the provisions, as interpreted by the FCC in regulations, or as otherwise applied." *Id.* at 717. And finally, the Court noted that its ruling upholding against facial challenge the § 201 disclosure provisions of Title II "does not foreclose possible future challenges to particular applications" of that statutory requirement. *Id.* at 692.

While these dicta concerning the possible future facial challenges to other provisions do not preclude the possibility that the Supreme Court might uphold an as-applied challenge to the provisions before us, in the face of the strength of the Court's holding with specific reference to these provisions, we cannot possibly conclude that plaintiff has made out a substantial likelihood of success on the merits.

Our reading of *McConnell* that as-applied challenges to § 441b are foreclosed is but one reason we find little likelihood of success on the merits. The facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating. *Id.* at 695. In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of support or opposition" regarding candidates. *Id.* at 651, 697, 715. Here, WRTL and WRTL's PAC used other print and

electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media. (See Def.'s Opp. Exh. 4, 16, 18.) This followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement (Def.'s Opp. Exh. 10-14), and the PAC announcing as a priority "sending Feingold packing." (Def.'s Opp'n Exh. 4.)

As to the second part of the preliminary injunction standard, we hold that plaintiff has not demonstrated that it will suffer irreparable harm in the absence of a preliminary injunction. Plaintiff relies on the general statement that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Unquestionably, as a general proposition of law, that statement is true. However, in adjudicating entitlement of a plaintiff to a preliminary injunction, we must apply the whole four-part test, which requires us to determine whether the "balance. of harms favor[s] plaintiffs." *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1137 (D.C. Cir. 1988). That said, the actual limitation on plaintiff's freedom of expression, as protected by the First Amendment, is not nearly so great as plaintiff argues. At least for purposes of a preliminary injunction, the present showing appears to be that plaintiff is not precluded from forwarding its message, or even from exposing the public to the particular advertisements at issue. As we understand it, the BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spending through political action committees (PACs).[1] In *McConnell*, the Supreme Court noted that

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[1] WRTL also has alternative methods available to communicate its message in addition to using PAC funding for broadcast ads, namely, using print media, such as newspaper or magazine advertisements, press releases, pamphlets, informational mailings, and billboards; using elec-

though "corporations . . . may not use their general treasury funds to finance electioneering communications, . . . they remain free to organize. and administer segregated funds, or PACs, for that purpose." *Id.* at 695. The Court went on to reason that "'the PAC option allows corporate political participation without the temptation to use corporate funds for political influence . . . .'" *Id.* (quoting *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200, 2211 (2003)).

The *Beaumont* decision quoted by the Supreme Court in *McConnell*, while not directly on point as it did not deal with the current statute, is instructive. That case involved a challenge to the regulation of a corporation's political contributions while the present involves regulation of electioneering communications. Nonetheless, the analogy is obvious. In *Beaumont*, the Supreme Court endorsed the constitutional adequacy of "the PAC option." That holding by the Supreme Court not only weighs against the likelihood of success on the merits, but it also suggests that plaintiff has not advanced a strong case of irreparable harm in the absence of a preliminary injunction. Certainly, it suggests that the harm established by plaintiff will not weigh much in the balance against potential harm to others under the third step of the test or against the public interest under the fourth. Therefore, WRTL has failed the second as well as the first step of the four-part test.

Given the absence of merit in plaintiff's case on the first element of the preliminary injunction test and the near-total absence of irreparable harm to the plaintiff under the second, we need not linger long over the third and fourth elements. The harm to the opposing party, the Federal Election Commission, is evident. Everyone agrees that it is the statutory duty of the defendant to enforce the BCRA. If we enter the preliminary injunction, then, to the extent of that injunction, the Commission cannot perform its duty. We

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tronic communications, such as e-mailing and internet posting; and placing telephone calls.

hold that an injunction against the performance of its statutory duty constitutes a substantial injury to the Commission, although given plaintiff's failure on the first two elements, we do not consider that showing essential to our denial of the preliminary injunction.

Similarly, since plaintiff has not established any entitlement to a preliminary injunction, it is not essential that we determine that the grant of such an injunction would fail to further the public interest, but for the sake of completion of record for the purposes of any review that might be sought, we do hold that plaintiff has not established that the public interest would be furthered by the injunction. The Supreme Court has already determined that the provisions of the BCRA serve compelling government interests. *See McConnell*, 124 S.Ct. at 695-96. To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court in *McConnell*, the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.

In short, plaintiff's case falls far short of the four-part test for the grant of a preliminary injunction. Therefore, we have denied plaintiffs motion. In light of this disposition, we further order that the parties hereto file supplemental memoranda within ten days of the date of this memorandum and order addressing the question whether this matter should be dismissed.

This the 17th day of August, 2004.

/s/ [illegible]

United States
Circuit Judge

/s/ [illegible]

United States
District Judge

/s/ [illegible]

United States
District Judge

EXHIBIT A

Radio Script

Client Wisconsin Right to Life
Title: "Wedding" :60
Job#: WRL-8136
Date: July 15, 2004

AUDIO	TALENT
We hear church bells up and under...	PASTOR: And who gives this woman to be married to this man?
	BRIDE'S FATHER (rambling): Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up...
	VO: Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve.

Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

BRIDE'S FATHER (rambling):

Then you get your joint compound and your joint tape and put the tape up over...

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org. That's BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

EXHIBIT B

Radio Script
Client: Wisconsin Right to Life
Title: "Loan" :60
Job#: WRL-8136
Date: July 14, 2004

AUDIO	TALENT
	LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and, well...
	COUPLE: Yes, yes... we're listening.
	OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River in Waupaca...
	VO: Sometimes it's just not fair to delay an important decision.

But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve.

It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

EXHIBIT C

TV Script
Client: Wisconsin Right to Life
Title: "Waiting" :30
Job#: WRL-8136
Date: July 14, 2004

VIDEO	TALENT
We see vignettes of a middle-aged man being as productive as possible while his professional life is in limbo:	
He reads the morning paper He polishes his shoes He checks for mail, which hasn't arrived He scans through his Rolodex He reads his Palm Pilot manual He pays bills	VO: There are a lot of judicial nominees out there who can't go to work Their careers are put on hold because a group of U.S. Senators is filibustering—blocking qualified nominees from a simple "yes" or "no" vote. It's politics at work and it's causing gridlock. Contact Senators Feingold and Kohl and tell them to oppose the filibuster
SUPER: www.BeFair.org	Visit BeFair.org

4-SECOND DISCLAIMER (4% or 20 scan lines):

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising, not authorized by any candidate or candidate's committee.

WRL REPRESENTATIVE VO:

Wisconsin Right to Life is responsible for the content of this advertising.

STATUTORY PROVISIONS

2 U.S.C. § 434(f)(1)-(3)

§ 434. Reports

* * *

(f) *Disclosure of electioneering communications.*

(1) *Statement required.* Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $ 10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement.* Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section

101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) *Electioneering communication.* For purposes of this subsection –

(A) *In general.*

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which–

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office

other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions.* The term "electioneering communication" does not include –

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may

promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)).

(C) *Targeting to relevant electorate.* For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons –

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

2 U.S.C. § 441b(a)-(b)(2)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candi-

date, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 79l(h)), the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 301 (2 U.S.C. § 431), and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel

and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

BCRA § 403(a), 116 Stat. 113-114

Sec. 403. Judicial Review

(a) Special Rules for Actions Brought on Constitutional Grounds. – If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

11 C.F.R. § 100.29

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) Electioneering communication means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section –

(1) Broadcast, cable, or satellite communication means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) Publicly distributed means aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons –

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, http://www.fcc.gov. A link to that site is available on the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons

in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or (C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) Can be received by 50,000 or more persons means–

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the

population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour –

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that –

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) Electioneering communication does not include any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office; or

(6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

11 C.F.R. § 114.2(a)-(b)

§ 114.2 Prohibitions on contributions and expenditures.

(a) National banks and corporations organized by authority of any law of Congress are prohibited from making a contribution, as defined in 11 CFR 114.1(a), in connection with any election to any political office, including local, State and Federal offices, or in connection with any primary election or political convention or caucus held to select candidates for any political office, including any local, State or Federal office. National banks and corporations organized by authority of any law of Congress are prohibited form making expenditures as defined in 11 FR 114.1(a) for communications to those outside the restricted class expressly advocating the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party, with respect to an election to any political office, including any local, State or Federal office.

(1) Such national banks and corporations may engage in the activities permitted by 11 CFR part 114, ex-

cept to the extent that such activity is foreclosed by provisions of law other than the Act.

(2) The provisions of 11 CFR part 114 apply to the activities of a national bank, or a corporation organized by any law of Congress, in connection with local, State and Federal elections.

(b)(1) Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR part 100, subpart B. Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 114.1(a) in connection with any Federal election.

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D;

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party; or

(iii) Making payments for an electioneering communication to those outside the restricted class. However, this paragraph (b)(2)(iii) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:

(A) The committee is not a political committee as defined in 11 CFR 100.5;

(B) The committee incorporated for liability purposes only;

(C) The committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and

(D) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

11 C.F.R. § 114.14

§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.

(a)(1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication.

(c) The prohibitions at paragraphs (a) and (b) of this section shall not apply to funds disbursed by a corporation or labor organization, or received by a person, that constitute --

(1) Salary, royalties, or other income earned from bona fide employment or other contractual arrangements, including pension or other retirement income;

(2) Interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or

(3) Receipt of payments representing fair market value for goods provided or services rendered to a corporation or labor organization.

(d)(1) Persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of an electioneering communication.

(2) Any person who wishes to pay for electioneering communications may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104. Use of funds exclusively from such an account to pay for an electioneering communications shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for an electioneering communication shall be required to only report the names and addresses of those individuals who donated or otherwise provided an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.